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No. 83-

IN THE

Supreme Court of the United States

OCTOBER TERM, 1983

ARMCO INC.,

Appellant,

v.

DAVID C. HARDESTY, JR.,
State Tax Commissioner of West Virginia,

Appellee.

ON APPEAL FROM THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

JURISDICTIONAL STATEMENT

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August 23, 1983

QUESTIONS PRESENTED

The following questions are presented by this appeal:

1. Whether the Due Process Clause and the Commerce Clause require a substantial nexus between a state levying a gross receipts tax on sales outside the state and the activity or transaction subjected to such tax.

2. Whether the "unitary business" principles applicable with respect to taxes on net income may be extended to state gross receipts taxes so as to permit a finding of sufficient nexus by reason of a taxpayer's activities in the taxing state otherwise unrelated to the taxed transaction.

3. Whether the Commerce Clause prohibits a state from imposing a non-apportioned gross receipts tax on wholesale sales of property manufactured outside the state, where an exemption from the tax is provided with respect to the wholesale sales of property manufactured within the state.

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JURISDICTIONAL STATEMENT

Appellant, Armco Inc., appeals from the final order of the Supreme Court of Appeals of West Virginia ("West Virginia Supreme Court") which reversed a judgment of the Circuit Court of Kanawha County, West Virginia ("Circuit Court"). The Circuit Court had held that the activities in West Virginia of certain product divisions of Armco were not sufficient to permit imposition of the West Virginia business and occupation tax on the gross receipts from sales made by these divisions to customers in West Virginia.

A Designation of Corporate Relationships pertaining to Armco is, pursuant to Rule 28.1, found at Appendix F below.

OPINIONS BELOW

The opinion of the West Virginia Supreme Court (Appendix A) has not been officially reported, but may be found at 303 S.E.2d 706 (1983). The opinion of the Circuit Court (Appendix B) is not reported.

JURISDICTION

The West Virginia Supreme Court rendered its opinion and entered a final order on May 25, 1983 reversing the judgment of the Circuit Court, from which appeal to the West Virginia Supreme Court had been taken. A Notice of Appeal (Appendix E) was filed in the West Virginia Supreme Court on August 19, 1983. The time within which to docket this appeal in this Court expires on August 23, 1983, and timely docketing has been made. The jurisdiction of this Court is invoked under 28 U.S.C. § 1257(2).

CONSTITUTIONAL AND STATUTORY PROVISIONS

Commerce Clause (Art. I, § 8, cl. 3) and Due Process Clause (Amend. XIV) of the United States Constitution.

West Virginia Code, §§ 11-13-1, 11-13-2, 11-13-2a, 11-13-2b, and 11-13-2c.

These constitutional and statutory provisions are reproduced in pertinent part as Appendix G.

STATEMENT OF THE CASE

West Virginia imposes a business and occupation privilege tax upon the gross receipts realized from wholesale sales of tangible property by persons engaging or continuing within the state in the business of selling any tangible property. An exemption from this tax is provided with respect to property

manufactured in West Virginia. This appeal challenges the constitutionality of this tax where applied to sales consummated outside West Virginia, the majority of which were also solicited outside West Virginia.

Armco is an Ohio corporation headquartered in Middletown, Ohio. During the relevant years (1970-1975) Armco was engaged in the business of mining, cleaning and selling coal at several mines in West Virginia. No issue is presented on this appeal as to West Virginia taxes imposed on Armco's coal mining operations.

Three manufacturing divisions of Armco sold goods manufactured outside West Virginia to wholesale customers within that state during the period involved here. In each case these sales were completely unrelated to Armco's West Virginia coal mining operations. In addition, these sales were consummated outside West Virginia, and title to the goods passed when they were delivered to a common carrier outside West Virginia for shipment into the state. These Armco divisions were the following:

The Steel Group. Armco's Steel Group manufactured steel outside West Virginia which it sold to wholesale customers in various states including West Virginia. The Steel Group maintained no office or inventory of steel in West Virginia, and none of its salesmen were residents of West Virginia. The sole connection between the Steel Group and West Virginia was that its Cincinnati and Pittsburgh offices each sent two salesmen into West Virginia once every four to six weeks. These salesmen were not authorized to accept or reject orders. Moreover, the majority of sales of steel shipped to West Virginia were to wholesale customers whose orders were both solicited and obtained outside West Virginia.

The Wire Rope Group. The activities of the Wire Rope Group in West Virginia were similar in every respect to those of the Steel Group, except that it employed one salesman who visited West Virginia once or twice a month.

The Metal Products Division. The Metal Products Division maintained an office in West Virginia during the relevant period which was responsible for sales of all of the products of this Division except metal buildings. No issue is presented on this appeal with respect to these sales from the West Virginia office. The Division's sales of metal buildings in West Virginia were in every respect similar to those of the Steel Group and the Wire Rope Group, except that the Metal Products Division employed no salesmen to sell metal buildings in West Virginia. Rather, the metal buildings were sold by independent franchisees who were West Virginia residents.

Armco commenced its judicial challenge to the West Virginia business and occupation tax in the Circuit Court by petitioning that court to review a prior administrative decision of the State Tax Department of West Virginia which had sustained an assessment contested by Armco. Armco had petitioned for reassessment upon the ground that the state is prohibited under the Due Process Clause and Commerce Clause of the Constitution from taxing sales by Armco which take place outside of the state and have no contact with the state other than occasional solicitation within the state, and upon the ground that the state's tax scheme discriminates against interstate commerce in violation of the Commerce Clause.

The Circuit Court sustained Armco's challenge on the ground that no substantial nexus existed between the state and the described transactions; having so held, that Court did not reach the question of discrimination against interstate commerce. On appeal, the West Virginia Supreme Court reversed the Circuit Court, holding (i) that a substantial nexus between West Virginia and the sales transactions in question was not required to uphold the tax, and (ii) that Armco's claim that the statute discriminates against interstate commerce was without merit.[1]

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1 The West Virginia Supreme Court also remanded the case to the Circuit Court solely for the ministerial purpose of computing the tax due. All of the issues involved were fully and finally adjudicated by the opinion and order of the West Virginia Supreme Court (Appendices A and D).

THE QUESTIONS PRESENTED ARE SUBSTANTIAL

The questions presented in this case are substantial and merit plenary consideration for three reasons.

First, the decision of the West Virginia Supreme Court is in irreconcilable conflict with the decision of this Court in *Norton Co. v. Dep't of Revenue of Illinois*, 340 U.S. 534 (1951), although the courts of other states continue to accept *Norton* as governing law. *See, e.g., Alaska v. Sears, Roebuck*, 660 P.2d 1188 (Alaska 1983); *Chicago Bridge & Iron Co. v. State Dep't of Revenue*, 98 Wash. 2d 814 (1983). In its opinion, the West Virginia Supreme Court tacitly acknowledges the conflict with, and attempts to justify its disregard of, *Norton*, by concluding that a "weakening of *Norton*" may be inferred from subsequent decisions of this Court.

Second, the decision of the West Virginia Supreme Court extends to unapportioned gross receipts taxes the "unitary business" principle developed in, and heretofore confined to, net income tax cases. *E.g., Exxon Corp. v. Wisconsin Dep't of Revenue*, 447 U.S. 207 (1980); *Container Corp. of America v. Franchise Tax Board*, 103 S. Ct. 2933 (1983). Extension of the unitary business principle and consequent obliteration of the long recognized distinction between apportioned net income taxes and unapportioned gross receipts and other similar direct taxes could well have an impact on the business community and states' tax practices equivalent to that of this Court's decision in *Northwestern States Portland Cement Co. v. Minnesota*, 358 U.S. 450 (1959).

This case squarely presents the question whether *Norton* remains valid or has been superseded by the "unitary business" principles. Because the decision below incorrectly concludes that *Norton* has in effect been overruled by this Court and relies extensively on *Exxon Corp.*, a *per curiam* affirmance of that decision would compound existing, and generate additional, confusion with respect to the scope of a state's power to subject extraterritorial transactions to gross receipts taxes. Even if this Court chooses to abandon the *Norton* doctrine, it

should be overruled only after plenary consideration, and not inferentially by a summary affirmance here.

Third, the decision below incorrectly decides important Constitutional questions by misapplying the anti-discrimination prong of the test enunciated in *Complete Auto Transit, Inc. v. Brady*, 430 U.S. 274 (1977), for determining the constitutionality of state assertions of taxing authority over interstate commerce.

The issues presented by this case can arise whenever a state seeks to impose a gross receipts tax on transactions conducted outside that state by an out-of-state taxpayer with other unrelated activities within the state. Thus, the questions raised here are of fundamental importance to the taxing authorities of all states and political subdivisions thereof which now impose a tax measured by a taxpayer's gross receipts or which may contemplate doing so in the future and to persons making sales in interstate commerce potentially subject to such taxes.

I

The Decision Below Is In Irreconcilable Conflict With The Decision Of This Court In *Norton Co. v. Dep't of Revenue of Illinois*, 340 U.S. 534 (1951).

West Virginia takes the position that sales transactions consummated outside that state resulting in shipments into West Virginia are subject to taxation by West Virginia as a result of nexus which exists between other unrelated activities of Armco and West Virginia, without regard to whether the transactions in question have a nexus with the state.

The Circuit Court held that under the Due Process and Commerce Clauses some nexus between the taxing state and the activity or transaction to be taxed is a prerequisite to imposition of the gross receipts tax and that such nexus was not present with respect to sales made by the three Armco divisions involved here. This was because those divisions' only activity in West Virginia was personal solicitation of orders by

a few nonresident traveling salesmen visiting West Virginia once every two to six weeks.

The West Virginia Supreme Court rejected the Circuit Court's approach of considering the particular divisions' lack of business activity within West Virginia and held that it is sufficient that the overall activities in the state of a unitary business are substantial. Since Armco had extensive coal operations in West Virginia, albeit unrelated to the sales transactions in question except as part of Armco's unitary business, the West Virginia Supreme Court held the tax applicable, stating:

> In the present case, we believe that where a unitary business, such as Armco, has a substantial nexus in this State . . . we are not required to separate the activities of [Armco's] various divisions doing business in this State and treat them separately for purpo es of determining whether in isolation they have a sufficient connection to this State to warrant the imposition of a business and occupation tax. The taxpayer is a unitary business corporation conducting its business activity under one corporate umbrella.

App. A, *infra*, 14a-15a.

In *Norton*, which similarly involved a gross receipts tax for the privilege of engaging in specified business, this Court held that to find the required nexus one must look to the contact between the taxing state and the *transaction* it seeks to tax, not simply to the contact of the taxpayer with the state. In *Norton*, a Massachusetts manufacturer maintained a branch office and warehouse in Illinois from which it made local retail sales; Illinois buyers also placed orders directly with the main office of the manufacturer in Massachusetts, receiving direct shipment from Massachusetts. This Court affirmed the imposition of tax on the proceeds of sales from orders received or filled by the Illinois branch office, but said that the tax could not be applied to sales unrelated to the local facility. This Court held the Illinois tax invalid with respect to sales where the only

intrastate activity associated with those sales was occasional engineering and technical advice, stating:

> The only items that are so clearly interstate in character that the State could not reasonably attribute their proceeds to the local business are orders sent directly to Worcester by the customer and shipped directly to the customer from Worcester. Income from those we think was not subject to this tax.

340 U.S. at 539.

This Court's view that nexus must exist with respect to each individual activity was demonstrated by the following statement:

> But when, as here, the corporation has gone into the State to do local business by state permission and has submitted itself to the taxing power of the State, it can avoid taxation on some Illinois sales only by showing that particular transactions are dissociated from the local business and interstate in nature.

Norton, 340 U.S. at 537. The sales made by the Armco divisions involved here could not be further "dissociated" from Armco's coal mining activities in West Virginia.

The West Virginia Supreme Court chose to disregard *Norton*, alleging a "weakening of *Norton*" by this Court's decisions in *General Motors Corp. v. Washington*, 377 U.S. 436 (1964), and *Standard Pressed Steel Co. v. Washington Dep't of Revenue*, 419 U.S. 560 (1975). In *General Motors*, however, this Court recognized the validity of the *Norton* dissociation test by stating that to avoid the Washington business and occupation tax the corporation "has the burden of showing that the operations of these divisions in the State are 'dissociated from the local business and interstate in nature' ", 377 U.S. at 441, and examined the activities of each division of the taxpayer. In *Standard Pressed Steel* only one customer (Boeing) buying one type of product (fasteners) was involved and the taxpayer's sole activity in the taxing jurisdiction was entirely devoted to those sales.

Moreover, *General Motors* and *Standard Pressed Steel* are clearly distinguishable from the case at bar. In *General Motors*, the taxpayer had a warehouse in the state from which it sold and shipped parts and accessories to dealers for each division. Each division had full-time resident employees whose activities went far beyond solicitation and had either a formal branch office or "the homes of these officials were used as corporate offices." 377 U.S. at 447. This Court sustained these activities as sufficient to support the business and occupation tax on the direct out-of-state shipment of cars, parts and accessories to dealers within the state because these sales were so intertwined with the "maze of local connections", 377 U.S. at 448, as to be incapable of being "dissociated from the local business." Thus, instead of rejecting the *Norton* dissociation test, in *General Motors* this Court simply applied the test and found that dissociation was not possible on the facts presented.

In *Standard Pressed Steel*, the State of Washington sought to impose its business and occupation tax on all sales made by Standard Steel to the Boeing Company. Standard Steel had its headquarters in Pennsylvania where it received direct orders from Boeing which it filled and shipped directly to Boeing. The taxpayer's connection with Washington was an employee who worked full time in Washington and whose job it was to consult with Boeing regarding its product needs and to make arrangements for periodic visits to Boeing by Standard Steel's out-of-state engineers. This Court held that the maintenance of an employee within the state full time in a position substantially important to the sales to Boeing brought such sales within the scope of Washington's taxing authority.

In the case at bar, the conduct of mining operations in West Virginia by Armco is wholly unrelated to the sales of steel products to customers located in that state—to a degree, in fact, which is much greater than the dissociation favored in *Norton*. Armco does not maintain any employees in West Virginia with duties related to the sales of steel products.

Finally, it should be noted that this Court has cited *Norton* in more recently decided state tax cases for the proposition that

the activities surrounding a particular transaction must be examined to determine if the constitutionally required nexus exists. *E.g.*, *National Geographic v. California Bd. of Equalization*, 430 U.S. 551, 560 (1977); *American Oil Co. v. Neill*, 380 U.S. 451, 458 (1965).

Because it concluded that *Norton* should not be applied to the instant case, the West Virginia Supreme Court did not pass on whether there was any nexus between West Virginia and the sales of steel products to customers located within West Virginia on which the tax was asserted. The Circuit Court, however, did test those transactions.

The Circuit Court below referred to the first of the four criteria enumerated in *Complete Auto Transit, Inc. v. Brady*, 430 U.S. 274, 279 (1977), for sustaining a tax against Commerce Clause challenge, *i.e.*, "the tax [must be] applied to an activity with a substantial nexus with the taxing state." The Circuit Court then correctly held that: "In this case the solicitation on a part-time basis in this state by the nonresident traveling salesmen does not constitute a 'substantial nexus.' " App. B, *infra*, 27a. As the Circuit Court below also held:

> The taxpayer in the case *sub judice* has met its burden of showing that no local presence contributes to the interstate business.

App. B, *infra*, 28a.

Even if mere solicitation were deemed to establish sufficient nexus, Armco sales which involved no solicitation in West Virginia would be exempt. The Circuit Court below found that approximately 77 percent of Armco's steel product sales to customers located in West Virginia were to three companies whose orders were solicited outside of the state. As to those sales, this case is indistinguishable from *American Oil Co. v. Neill*, 380 U.S. 451 (1965), which held that shipments into Idaho pursuant to sales orders obtained outside the state could not, under the Due Process Clause, be subjected to an Idaho excise tax even though the taxpayer had substantial local activities.

The *Norton* dissociation test should be applied in the case at bar to invalidate taxation by West Virginia of individual transactions having no substantial nexus with that state.

II

The Decision Below Is Incorrect In Holding That Nexus Established By Application Of The Unitary Business Principle Is Sufficient To Validate A Gross Receipts Tax Under The Commerce And Due Process Clauses.

The legal discussion in the West Virginia Supreme Court's opinion commences by quoting this Court's summary in *Exxon Corp.* of the requirements of due process but fails to note that in *Exxon Corp.* this Court was expressly referring only to taxes on net income. App. A, *infra*, 5a. While mentioning several pages later that *Exxon Corp.* involved "a different type of state tax", the West Virginia Supreme Court nevertheless subsequently finds "an obvious parallel between Exxon's divisional operation claim and Armco's claim presented here", and ultimately concludes that it "can see no distinction between this situation and the unitary business concept." App. A, *infra*, 10a, 11a and 15a.

The classic statement of the relevant distinction between gross receipts and net income taxes is contained in *United States Glue Co. v. Town of Oak Creek*, 247 U.S. 321, 328-9 (1918):

> **The difference in effect between a tax measured by gross receipts and one measured by net income, recognized by our decisions, is manifest and substantial, and it affords a convenient and workable basis of distinction between a direct and immediate burden upon the business affected and a charge that is only indirect and incidental. A tax upon gross receipts affects each transaction in proportion to its magnitude and irrespective of whether it is profitable or otherwise. Conceivably it may be sufficient to make the difference between profit and loss, or to so**

> diminish the profit as to impede or discourage the conduct of the commerce. A tax upon the net profits has not the same deterrent effect, since it does not arise at all unless a gain is shown over and above expenses and losses, and the tax cannot be heavy unless the profits are large.

In *Northwestern States Portland Cement Co. v. Minnesota*, 358 U.S. 450 (1959), when this Court approved the imposition of a net income tax on a corporation with exclusively interstate income, it cited *United States Glue*'s distinction between "an invalid direct levy. . . and a charge by way of net income." *Id.* at 459. The Congressional response in the Interstate Income Tax Act, 15 U.S.C. §§ 381-384, likewise dealt only with taxes on or measured by net income.

The distinction continued to be recognized in, *inter alia*, *General Motors Corp. v. Washington*, 377 U.S. 436, 440 (1964), and *Standard Pressed Steel Co. v. Dep't of Revenue of Washington*, 419 U.S. 560, 563 (1975). *See also National Geographic Society v. California Bd. of Equalization*, 430 U.S. 551 (1977).

The cases in which this Court has recently approved application of the unitary business principle are net income tax cases: *Exxon Corp.*, *supra*; *Mobil Oil Corp. v. Commissioner of Taxes*, 445 U.S. 425 (1980); *Asarco, Inc. v. Idaho State Tax Commissioner*, 102 S. Ct. 3103 (1982); *F.W. Woolworth Co. v. Taxation and Revenue Dep't of New Mexico*, 102 S. Ct. 3128 (1982); and *Container Corp. of America v. Franchise Tax Board*, 103 S. Ct. 2933 (1983). In each of these cases the unique difficulties of otherwise determining states' respective shares of the net income of a multi-state business is recognized as the reason for the unitary business principle. No such difficulties are presented by a gross receipts tax.

In invoking the unitary business principle to replace *Norton*, the West Virginia Supreme Court diminishes the direct relationship heretofore necessary to sustain a gross receipts tax to a mere showing that the activity to be taxed was part of a unitary

business, any facet of which had a substantial nexus with the taxing jurisdiction and received protection, opportunities and benefits for which the state could ask return. This is a startling departure from prior decisions of this Court. Moreover, while relying on the looser standards applicable to apportioned net income taxes, the West Virginia Supreme Court simultaneously rejects any need of apportionment to reflect the contribution of out-of-state activities to producing the gross receipts being taxed.

Extension of the "unitary business" principle as the Due Process and Commerce Clause standard from the apportioned net income tax area to unapportioned gross receipts taxes and other similar direct taxes is a radical and unwarranted step.

III

The Decision Below Does Not Correctly Apply The Anti-Discrimination Standard For Testing Conformity With The Commerce Clause.

The West Virginia tax on the business of selling tangible property at wholesale discriminates against interstate commerce by exempting from the tax certain sales of in-state manufacturers while not providing a similar exemption for out-of-state manufacturers. A state does not have the power to tax when the effect of the tax is to discriminate against interstate commerce. *Boston Stock Exchange v. State Tax Commission*, 429 U.S. 318 (1977). Thus, a state may not tax local transactions involving products manufactured or business operations performed in any other state at a higher rate than similar local activities with no out-of-state components. Because the effect of the West Virginia business and occupation tax is to impose a higher rate of tax on wholesale sales of goods manufactured without the state, that tax violates the Commerce Clause.

The West Virginia Supreme Court erroneously rejected this conclusion on two grounds: first, the same exemption is

available to an out-of-state corporation if it chooses to manufacture its goods within West Virginia, and second, in-state manufacturers are subject to a business and occupation tax on manufacturing which is levied at a rate which exceeds the tax on wholesale sales.

The observation of the court below that Armco could avail itself of the same exemption by both manufacturing and selling within West Virginia does not address the issue of whether the exemption causes the tax to discriminate against interstate commerce because the court's suggestion for avoiding the tax reduces the commerce engaged in from interstate to purely intrastate. The decision below holds, in effect, that a tax on interstate commerce which is not applied to intrastate commerce is permissible where those engaged in the interstate commerce theoretically could avoid the tax by ceasing interstate commerce and engaging exclusively in intrastate commerce. The hypothetical remedy for Armco posed by the court below clarifies the discrimination against interstate commerce instead of exonerating the state scheme. Although the court's first point might be valid if the defect complained of were discrimination against Armco itself, it is inapplicable to Armco's argument of discrimination against interstate commerce.

The court's second argument, that no discrimination exists because in-state manufacturers are taxed on their manufacturing activity at a higher rate is also erroneous. Even when analyzed in conjunction with the tax on manufacturing activities, it can be seen that the state scheme for taxing sales imposes a greater, and therefore impermissible, burden on interstate sales activities. Consider commerce involving West Virginia and a hypothetical second state with a business and occupation tax identical to that of West Virginia.[2] The activi-

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2 This method of analysis, *i.e.*, reference to the overall result if every jurisdiction applied the same tax laws, was very recently approved by this Court in *Container Corp. of America v. Franchise Tax Board*, 103 S. Ct. 2933, 2942 (1983).

ties of manufacturing goods and selling them at wholesale, when both are performed in either one of the two states (*i.e.*, wholly intrastate commerce), would subject the taxpayer to tax on the manufacturing activity, but not on the wholesale activity. The taxpayer who manufactures identical goods in one of the states and sells them at wholesale in the other, however, incurs liability both for tax on the manufacturing activity in the first state (in the same amount as the intrastate taxpayer) and for tax on the sales in the second state. Thus, the interstate taxpayer suffers a total business and occupation tax liability which exceeds the tax imposed on the intrastate taxpayer by an amount equal to the tax on wholesale sales.

Clearly, the West Virginia business and occupation tax scheme works discriminatorily to impose a burden on interstate commerce which is not borne by intrastate commerce. Accordingly, the West Virginia business and occupation tax on sales violates the Commerce Clause of the United States Constitution.

CONCLUSION

For the foregoing reasons, this Court should note probable jurisdiction of this appeal.

Dated: August 23, 1983

Respectfully Submitted,

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APPENDICES

Appendix A

OPINION OF THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

Justice McHugh, deeming himself disqualified, did not participate in the consideration or decision of this case.

No. 15437

ARMCO, INC., ETC.

—v.—

DAVID C. HARDESTY, JR.,
STATE TAX COMMR., ETC.

Kanawha County — Reversed and Remanded.

MILLER, *Justice*

1. For the purposes of the Due Process and the Commerce Clauses of the United States Constitution, where a business has been found to have a substantial nexus with this State, and where there is a rational relationship between the tax imposed on its business activity within this State, and the protection, opportunities, and benefits afforded by the State, the tax will be upheld unless it is shown that the tax discriminates against interstate commerce or is not fairly apportioned.

2. Where a unitary business has a substantial nexus in this State through its qualifying to do business in this State, and engaging in operations such as coal mining and sales of metal products, we are not required to separate the activities of its

various divisions doing business in this State and treat them separately for purposes of determining whether in isolation they have a sufficient connection to this State to warrant imposition of a business and occupation tax.

3. Whether there is a rational relationship or fair apportionment of a tax to the local services and benefits afforded a taxpayer must also be answered by viewing the taxpayer's total activities in this State. West Virginia's business and occupation tax is composed of a number of individual taxes tied to specific business activities occurring within this State. Thus, the business and occupation tax bears a relationship or apportionment to business activity in this State because the tax is imposed based on the value of the business activity occurring within the State.

4. The Commerce Clause of the United States Constitution does not dictate an iron rule of equality between taxes laid by a State on different types of business activity.

5. Section 1 of Article X of the West Virginia Constitution does not require that the same rate of business and occupation tax be applied to all classes of business activity and callings to which the tax is applied. The Legislature may prescribe different rates for different businesses and callings, but the rate of taxation must be uniform and equal within each classification.

MILLER, *Justice*:

This is an appeal by the State Tax Commissioner from an order of the Circuit Court of Kanawha County which set aside a business and occupation tax deficiency assessment against Armco, Inc. The circuit court concluded that the wholesale classification provisions of the business and occupation tax law (W. Va. Code, 11-13-1, *et seq.*) did not apply to the operations of certain divisions of Armco, Inc. The circuit court's conclusion was based principally on its view that these divisions did not have a sufficient business nexus with the State of West

Virginia to support the imposition of the tax. On appeal the State Tax Commissioner claims that the circuit court erred in failing to find a sufficient nexus. We agree, and we reverse the decision of the Circuit Court of Kanawha County.

Armco, Inc., is an Ohio corporation qualified to hold property and do business as a foreign corporation in West Virginia. The corporation is divided into a number of divisions, four of which are relevant to the proceedings now before us: the Mining Division, the Steel Group, the Union Wire Rope Group, and the Metal Products Division. The proceeding out of which the present appeal arises involved the operations of the four divisions between January 1, 1970, and December 31, 1975.

During the period in question the Mining Division was extensively involved in mining, cleaning, and selling coal in West Virginia. The record indicates that during this period the company operated at least four mines which produced substantial amounts of coal. For instance, there is evidence that in the year 1974 alone, Armco's Number 7 Mine produced 545,288 tons of clean coal; Mine 11E produced 48,069 tons; Mine Number 8 produced 686,728 tons; and Mine Number 9 produced 257,815 tons. In the proceedings below the company did not challenge the fact that through its mining operations it had a business nexus with West Virginia.

The Steel Group of Armco produced certain steel products at nine plants located in seven states. There were no manufacturing facilities in West Virginia. This Group had no sales offices in West Virginia, but sold its products through its Cincinnati, Ohio office and its Pittsburgh, Pennsylvania office. There was evidence that the Cincinnati and Pittsburgh offices each sent two salesmen into West Virginia once every four to six weeks. The salesmen were not residents of West Virginia and had specific territories which included portions of other states. There was also evidence that one salesman went to Wheeling from Pittsburgh twice a month.

The salesmen were not authorized to accept or reject orders from West Virginia customers. Orders were forwarded to the Group's out-of-state offices where they were accepted or re-

jected. Goods ordered were shipped from out-of-state facilities by common carrier, and title passed to the common carrier at the out-of-state pick-up points. Follow-up calls by the salesmen were made to check customer satisfaction, and occasionally representatives of the Steel Group were called upon to investigate customer complaints and perform service work.

The Union Wire Rope Group's activities were similar to those of the Steel Division. It had a mill in Kansas City and warehouses in Ashland, Kentucky, and Pittsburgh, Pennsylvania. It maintained no inventory in West Virginia. It had no resident service or sales representatives in West Virginia, and it maintained no offices in the State. It had three salesmen—one each from Ashland, Kentucky, Pittsburgh, Pennsylvania, and Greensboro, North Carolina—who visited West Virginia once or twice a month. They took all orders subject to acceptance at Middletown, Ohio. The Group shipped goods into West Virginia in the same way as the Steel Division. The Union Wire Rope Group was not authorized to sell the Steel Division's products, and the Steel Division did not handle the Wire Rope Group's products.

Armco's Metal Products Division which produced and sold a number of construction products maintained an office in South Charleston, West Virginia. During the 1970-75 period two sales engineers and a secretary worked out of the office. The office managed the sales of all the Metal Products Division's products except metal buildings. The Division's metal buildings were sold by franchisees who were West Virginia residents operating in this State. They had agreements authorizing them to utilize the corporate name and trademarks, as well as corporate advertisements. Armco shared advertising expenses with its franchisees in order to promote sales.

On appeal Armco contends that because of the Due Process and the Commerce Clauses of the United States Constitution, the business and occupation tax cannot be imposed on the activities of the Steel Group, the Union Wire Rope Group, or on the sales of metal buildings by its Metal Products Division. Specifically, Armco claims that the operations of these divisions must be viewed separately, and, when so viewed, they do

not have a substantial business nexus with West Virginia, and that the taxes imposed upon these divisions are not fairly apportioned.

I.

The Due Process Clause and the Commerce Clause of the Constitution of the United States contain standards that must be met in order to sustain state taxation of a business which conducts both local and interstate business. In *Exxon Corp. v. Wisconsin Dept. of Revenue,* 447 U.S. 207, 219-20, 65 L.Ed.2d 66, 79, 100 S.Ct. 2109, 2118 (1980), the Supreme Court of the United States summarized the requirements of due process:

> "The Due Process Clause of the Fourteenth Amendment imposes two requirements for such state taxation: a 'minimal connection' or 'nexus' between the interstate activities and the taxing State, and 'a rational relationship between the income attributed to the State and the intrastate values of the enterprise.' *Mobil Oil Corp. v. Commissioner of Taxes,* [445 U.S. 425], at 436, 437, [63 L.Ed.2d 510, 520, 100 S.Ct. 1223, 1231]. See *Moorman Mfg. Co. v. Bair,* [437 U.S. 267], at 272-273, [57 L.Ed.2d 197, 204, 98 S.Ct. 2340, 2344]; *National Bellas Hess, Inc. v. Department of Revenue,* 386 U.S. 753, 756, [18 L.Ed.2d 505, 508, 87 S.Ct. 1389, 1391] (1967); *Norfolk & Western R.Co. v. State Tax Comm'n,* 390 U.S. 317, 325, [19 L.Ed.2d 1201, 1207, 88 S.Ct. 995, 1000] (1968)."

The requirements of the Commerce Clause overlap somewhat on the Due Process standards as illustrated by the Commerce Clause test given in *Department of Revenue of Washington v. Association of Washington Stevedoring Cos.,* 435 U.S. 734, 750, 55 L.Ed.2d 682, 697, 98 S.Ct. 1388, 1399 (1978):

> "The Court repeatedly has sustained taxes that are applied to activity with a substantial nexus with the State,

> that are fairly apportioned, that do not discriminate against interstate commerce, and that are fairly related to the services provided by the State. E.g., *General Motors Corp. v. Washington*, 377 U.S. 436 [12 L.Ed.2d 430, 84 S.Ct. 1564] (1964); *Northwestern Cement Co. v. Minnesota*, 358 U.S. 450 [3 L.Ed.2d 421, 79 S.Ct. 357, 67 A.L.R.2d 1292] (1959); *Memphis Gas Co. v. Stone*, 335 U.S. 80 [92 L.Ed. 1832, 68 S.Ct. 1475] (1948); *Wisconsin v. J. C. Penney Co.*, 311 U.S. 435 [85 L.Ed. 267, 61 S.Ct. 246, 130 A.L.R. 1229] (1940); *see Complete Auto Transit, Inc. v. Brady*, 430 U.S., at 279, and n. 8 [51 L.Ed.2d 326, 97 S.Ct. 1076]."

It would appear that the Due Process "minimal connection or nexus" is related to the Commerce Clause "activity with a substantial nexus with the State." Moreover, the Due Process requirement of a "rational relationship between the income attributed to the State and the intrastate values of the enterprise" is not incompatible with the Commerce Clause standard that the tax "must be fairly related to the service provided by the State." This view has some recent support from the Supreme Court itself, as illustrated by *Asarco Inc. v. Idaho State Tax Comm'n*, ___ U.S. ___, ___, 73 L.Ed.2d 787, 794, 102 S.Ct. 3103, 3109 (1982), where the Court, in a Due Process analysis, defined the "rational relationship" Due Process test in terms that are almost identical to the Commerce Clause requirement of "fairly related to the services provided:"

> "The broad inquiry in a case such as this, therefore, is 'whether the taxing power exerted by the state bears fiscal relation to protection, opportunities, and benefits given by the state. That simple but controlling question is whether the state has given anything for which it can ask return.' *Wisconsin v. J. C. Penney Co.*, 311 U.S. 435, 444 [85 L.Ed. 267, 270-71, 61 S.Ct. 246, 250] (1940)."

The dissent in *Asarco* candidly recognized that decisions under both the Commerce Clause and the Due Process Clause relied on a similar analysis:

> "Our cases establish that analysis of the validity of state taxation under the Commerce Clause is similar to analysis under the Due Process Clause. The test under the Commerce Clause is whether the tax 'is applied to an activity with a substantial nexus with the taxing State, is fairly apportioned, does not discriminate against interstate commerce, and is fairly related to the services provided by the State.' *Mobil Oil Corp. v. Commissioner of Taxes, supra,* at 443, 63 L.Ed.2d 510, 100 S.Ct. 1223 (quoting *Complete Auto Transit, Inc. v. Brady,* 430 U.S. 274, 279, 51 L.Ed. 2d 326, 97 S.Ct. 1076 (1977)." ___ U.S. at ___, n. 14, 73 L.Ed.2d at 816, n. 14, 102 S.Ct. at 3126-27, n. 14.

See also F. W. Woolworth Co. v. Taxation and Revenue Department of New Mexico, ___ U.S. ___, 73 L.Ed.2d 819, 102 S.Ct. 3128 (1982).

We conceive that for the purposes of the Due Process and Commerce Clauses of the United States Constitution, where a business has been found to have a substantial nexus with this State, and where there is a rational relationship between the tax imposed on its business activity within this State, and the protection, opportunities, and benefits afforded by the State, the tax will be upheld unless it is shown that the tax discriminates against interstate commerce or is not fairly apportioned.

The critical issue in the present case centers on Armco's claim that each of its separate divisions must be treated as a separate entity in analyzing whether the division is doing sufficient business to establish a nexus with this State to be taxed. Additionally, it contends that there is no rational relationship between the amount of tax imposed on the particular division and the protection, opportunities, and benefits the division obtains in return from this State.

Armco relies on *Norton Co. v. Department of Revenue of Illinois,* 340 U.S. 534, 95 L.Ed. 517, 71 S.Ct. 377 (1951), where the taxpayer contested an Illinois tax imposed on the selling of tangible property. That tax was measured by the gross receipts from the taxpayer's sales. The taxpayer's facility was in Massachusetts, but it maintained a sales office and warehouse in

Chicago from which it made sales throughout Illinois. Its Illinois sales could be divided into three categories: (1) direct purchases at the Chicago office; (2) mail orders filled in Massachusetts and sent to the Chicago office for pickup or further re-routing to Illinois customers; and (3) mail orders filled in Massachusetts and shipped directly to Illinois customers.

The Supreme Court held that the third category of activity was purely interstate because the record did not demonstrate that there was any local activity which could be related to the interstate mail order sales. The dissent in *Norton,* lead by Justice Clark, argued that there were local activities which related to the interstate sales. The dissent pointed out that the Chicago office offered service and technical advice on the company's products as well as handled customer complaints. Moreover, its total activities were sufficient to enable Illinois courts to obtain jurisdiction over the company and, therefore, all of these factors would permit taxation of the mail order sales.

Significantly, Justice Clark wrote for the majority in *General Motors Corp. v. Washington,* 377 U.S. 436, 12 L.Ed.2d 430, 84 S.Ct. 1564 (1964), where the issue was whether the State of Washington could impose its business and occupation tax measured by the gross wholesale prices of motor vehicles, parts and accessories shipped into the State. It was admitted that the vehicles, parts and accessories were shipped directly to dealers who had direct ordered the items from out-of-state manufacturing facilities.

The business connection of General Motors with Washington was that it had a warehouse in the state where it sold certain automobile parts. On these sales it paid a business and occupation tax. General Motors also had a resident district sales manager who worked out of his home and called on local dealers. There were service representatives who lived within the state and dealt with the dealers in regard to car servicing problems. The zone manager lived out of state but made trips into the state. In sustaining these activities as being sufficient to support the business and occupation tax on the direct

out-of-state shipment of cars, parts and accessories to dealers within the state, the Supreme Court stated:

> "In other words, the question is whether the State has exerted its power in proper proportion to appellant's activities within the State and to appellant's consequent enjoyment of the opportunities and protections which the State has afforded." 377 U.S. at 441, 12 L.Ed.2d 435, 84 S.Ct. at 1568.

It is apparent that General Motors contended that there was insufficient business connections in Washington as to four of its divisions: Chevrolet, Pontiac, Oldsmobile and General Motors Parts, as the Court made this comment:

> "Here it is admitted that General Motors has entered the State and engaged in activities therein. In fact, General Motors voluntarily pays considerable taxes on its Washington operations but contests the validity of the tax levy on four of its Divisions, Chevrolet, Pontiac, Oldsmobile and General Motors Parts." 377 U.S. at 441, 12 L.Ed.2d at 435, 84 S.Ct. at 1568.

The Court refused to narrow its inquiry to the precise business activity done by each division, but instead looked to the total business activity done by the corporation within the state.

Further weakening of *Norton*[1] is evident in *Standard Pressed Steel Co. v. Washington Department of Revenue,* 419 U.S. 560, 42 L.Ed.2d 719, 95 S.Ct. 706 (1975), where the State of Washington again sought to impose its business and occupation tax on all sales made by Standard Steel to the Boeing

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1 There can be no doubt that the four dissenting judges in *General Motors Corp. v. Washington, supra,* viewed the case as a significant departure from the *Norton* standard as they stated:

> "[T]he Court holds that the activities of the sales representatives constitute 'an in-state activity' forming 'a sufficient local incident upon which a tax may be based.' *Ante,* at 438. This decision departs from *Norton Co. v. Department of Revenue,* 340 U.S. 534 [95 L.Ed. 517, 71 S.Ct. 377], and adopts a test there rejected." 377 U.S. at 454, 12 L.Ed.2d at 442, 84 S.Ct. at 1574.

Company. Standard Steel had its headquarters in Pennsylvania where it received direct orders from Boeing which it filled and shipped directly to Boeing. Its only connection with Washington was an employee who lived in the state and operated out of his home. His job was to contact Boeing regarding its product needs and to make arrangements for periodic visits to Boeing by Standard Steel's out-of-state engineers. The taxpayer's claim that its nexus was too tenuous to support the tax was rejected by a unanimous court in this fashion:

> "We think the question in the context of the present case verges on the frivolous. For appellant's employee, Martinson, with a full-time job within the State, made possible the realization and continuance of valuable contractual relations between appellant and Boeing." 419 U.S. at 562, 42 L.Ed.2d at 722, 95 S.Ct. at 708.

Of some bearing, although involving a different type of state tax, is *Exxon Corp. v. Wisconsin Dept. of Revenue, supra,* where the question involved the validity, under both the Due Process and the Commerce Clauses, of the state's apportioned business income tax. Exxon, which was admittedly a vertically integrated petroleum company, had devised an internal accounting system which separated its operations into three main units: (1) exploration and production; (2) refining; and, (3) marketing. There was no dispute that its only business activity in Wisconsin fell into the third category—marketing. Exxon contended that Wisconsin could not utilize all of its business income in apportioning the state income tax but was restricted to taxing its marketing income. However, a unanimous court rejected this contention stating:

> "In order to exclude certain income from the apportionment formula, the company must prove that 'the income was earned in the course of activities unrelated to the sale of petroleum products in that State.' *Mobil Oil Corp. v. Commissioner of Taxes, supra,* at 439 [63 L.Ed.2d 510, 522, 100 S.Ct. 1223, 1232]. The court looks to the 'underlying economic realities of a unitary business,' and

> the income must derive from 'unrelated business activity' which constitutes a 'discrete business enterprise,' 455 U.S., at 441, 442, 439, 100 S.Ct., at 1233, 1234, 1232." 447 U.S. at 223-24, 65 L.Ed.2d at 81, 100 S.Ct. at 2120.

The Court went on to hold that because there were many facts showing a unitary business, including a central board of directors and operating officers as well as operational interchanges between the three units, there was no unrelated business activity to require removal of the income from the other divisions.[2] There is an obvious parallel between Exxon's divisional operation claim and Armco's claim presented here that it is not subject to the business and occupation tax measured on its sales to State customers because a particular division in isolation has a limited business connection in this State.[3]

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2 The Court in *Exxon* mentioned these operational interrelationships:

> "As has already been noted, Exxon's Coordination and Services Management provided many essential corporate services for the entire company, including the coordination of the refining and other operational functions 'to obtain an optimum short range operating program.' App. 189. Many of the items sold by appellant in Wisconsin were obtained through a centralized purchasing office in Houston whose obvious purpose was to increase overall corporate profits through bulk purchases and efficient allocation of supplies among retailers. Cf. *Butler Bros. v. McColgan*, 315 U.S., at 508 [86 L.Ed. 991, 996, 62 S.Ct. 701, 705] ('the operation of the central buying division alone demonstrates that functionally the various branches are closely integrated'). Even the gasoline sold in Wisconsin was available only because of an exchange agreement with another company arranged by the Supply Department, part of Coordination and Services Management, and the Refining Department. Similarly, sales were facilitated through the use of a uniform credit card system, uniform packaging, brand names, and promotional displays, all run from the national headquarters." 447 U.S. at 224, 65 L.Ed.2d at 82, 100 S.Ct. at 2121.

3 We do not believe that either *Asarco, Inc. v. Idaho State Tax Commissioner, supra*, or *F. W. Woolworth Co. v. Taxation and Revenue Department of New Mexico, supra*, represents a retreat from the principles in *Exxon Corp. v. Wisconsin Dept. of Revenue, supra*. *Asarco, supra*, was an attempt to include within the taxable income of a non-resident corporation dividends, interest and capital gains it received from subsidiary corporations

Our cases involving our business and occupation tax[4] have responded to these United States Supreme Court opinions and have taken note of what is clearly a trend on the part of the Supreme Court to permit the states to exact a fair tax on interstate enterprises. The Supreme Court's position is summarized in this statement from *Department of Revenue of Washington v. Association of Washington Stevedoring Cos.*, 435 U.S. at 748, 55 L.Ed.2d at 695, 98 S.Ct. at 1398 (1978):

> "*Complete Auto*, recognized that a State has a significant interest in exacting from interstate commerce its fair share of the cost of state government. . . . All tax burdens do not impermissibly impede interstate commerce." (Citations omitted)[5]

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having no contact with the taxing state. *Woolworth* involved dividend income from a foreign (overseas) subsidiary. In each case, the Supreme Court held it could not be done because of the lack of a unitary business principle between the parent and its subsidiaries. The Court in *Asarco, supra*, emphasized the unitary business principle relied on in *Exxon* was lacking and stated in note 14:

> "The unitary business principle applied in *Mobil* and *Exxon* is not new. It has been a familiar concept in our tax cases for over 60 years. *See United States Steel Corp. v. Multistate Tax Commission*, 434 U.S. 452, 473 n. 25, 474, n. 26, 54 L.Ed.2d 682, 98 S.Ct. 799 (1978); *General Motors Corp. v. Washington*, 377 U.S. 436, 439, 12 L.Ed.2d 430, 84 S.Ct. 1564 (1964)." ___ U.S. at ___, 73 L.Ed.2d at 797, n. 14, 102 S.Ct. at 3111, n. 14. (Other citations omitted)

Significantly, *General Motors Corp. v. Washington, supra*, as we have previously discussed, involved a business and occupation tax.

4 For a resume of recent State tax decisions, *see* Lathrop, *Due Process And Commerce Clause Considerations Under The West Virginia Business and Occupation And Carrier Income Taxes—J.C. Penney v. Milacron*, 85 W. Va. L. Rev. 307 (1983).

5 *Complete Auto Transit, Inc. v. Brady*, 430 U.S. 274, 51 L.Ed.2d 326, 97 S.Ct. 1076 (1977), overruled *Spector Motor Service, Inc. v. O'Connor*, 340 U.S. 602, 95 L.Ed. 573, 71 S.Ct. 508 (1951), which had held that a state tax on the privilege of engaging in an activity in the State could not be applied to an activity that was part of interstate commerce. In lieu thereof, *Complete Auto* substituted a functional economic test that relates to

In *J. C. Penney Co., Inc. v. Hardesty*, ___ W. Va. ___, 264 S.E.2d 604 (1979), we sustained our business and occupation tax on the taxpayer's direct mail orders and its finance charges. The taxpayer conceded that it had a substantial business nexus with this State through the operation of a number of retail outlets but contended that its business activities in regard to direct mail orders and finance charges had no independent intrastate connection. We rejected this contention stating:

> "Like the manufacturer in *Standard Pressed Steel, supra* the activities of the taxpayer are greatly facilitated by its overall operations in West Virginia; there are sufficient contacts with the State to support a tax nexus." ___ W. Va. at ___, 264 S.E.2d at 610.

Of even more relevance is *Cincinnati Milacron Company v. Hardesty*, ___ W. Va. ___, 290 S.E.2d 902 (1982), where we found the taxpayer liable for a business and occupation tax on sales made by two of its operational divisions to local customers based on the fact that the company had qualified to do business in this State and had a sales engineer who spent forty-five percent of his time soliciting orders in this State. Additionally, the taxpayer would send service representatives into this State to handle particular service problems with the company's products.

We dealt with a franchise operation in *Virginia Foods of Bluefield, Virginia, Inc. v. Dailey*, ___ W. Va. ___, 239

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the economic activity of the business within the State and if the tax is fairly related to the benefits provided by the State. Most commentators appear to agree that the recent United States Supreme Court cases have relaxed Due Process Clause and Commerce Clause restrictions on state taxation of interstate business. *E.g.*, Hellerstein, *State Income Taxation of Multijurisdictional Corporations: Reflections on Mobil, Exxon and H.R. 5076*, 79 Mich. L. Rev. 113 (1980); Simes, *The Concept of Nexus and State Use and Unapportioned Gross Receipt Taxes*, 73 Nw. U. L. Rev. 112 (1978); Comment, *State Taxation of Interstate Business: An End to the Privilege Tax Immunity*, 29 U. Fla. L. Rev. 752 (1977); Note, *State Taxation on the Privilege of Doing Interstate Business: "Complete Auto Transit, Inc. v. Brady"*, 19 B.C.L. Rev. 312 (1978).

S.E.2d 770 (1977), where a Virginia food wholesaler was taxed under our business and occupation tax on the sales made in this State. It had three sales persons who were non-residents but who solicited periodically in West Virginia. Additionally, the taxpayer had two sales representatives one of whom worked full-time in this State soliciting sales of non-food items. The taxpayer also provided certain advisory services under its franchise. Based on these facts, we upheld the imposition of the tax stating in Syllabus Point 2:

> "A foreign corporation owning no property and having no place of business in this state, which engages in substantial business activities in this state which are essential to the establishment and maintenance of sales and which make possible the continuance of valuable contractual relationships is subject to this state's Business and Occupation Tax consistent with the Commerce Clause."

In *Western Maryland Railway Co. v. Hardesty*, ____ W. Va. ____, 282 S.E.2d 240, 244 (1981), in speaking of the nexus issue, we referred to *National Geographic Society v. California Board of Equalization*, 430 U.S. 551, 51 L.Ed.2d 631, 97 S.Ct. 1386 (1977), and stated:

> "It is clear that, when a direct relationship can be demonstrated between the tax and the cost to the State of the benefits and protections it affords, there is a sufficient nexus for taxation, *see id.* at 558, 97 S.Ct. at 1391, but the opposite is not true, i.e., nexus may exist even if the in-state activities are not shown to cost the State as much as the amount of the taxes. Neither is it necessary for there to be a nexus between the particular in-state activities of the taxpayer and the activity sought to be taxed. *Id.* We conclude that purposive, revenue generating activities in the State are sufficient to render a person liable for taxes."

In the present case, we believe that where a unitary business, such as Armco, has a substantial nexus in this State through its

qualifying to do business in this State, and engaging in operations such as coal mining and sales of metal products, we are not required to separate the activities of its various divisions doing business in this State and treat them separately for purposes of determining whether in isolation they have a sufficient connection to this State to warrant the imposition of a business and occupation tax. The taxpayer is a unitary business corporation conducting its business activity under one corporate umbrella. We can see no distinction between this situation and the unitary business concept used in *General Motors Corp. v. Washington, supra*, or *Exxon Corp. v. Wisconsin Dept. of Revenue, supra*.

II.

The question of whether there is a rational relationship or fair apportionment of a tax to the local services and benefits afforded a taxpayer must also be answered by viewing the taxpayer's total activities in this State. It must be kept in mind that our business and occupation tax is composed of a number of individual taxes tied to specific business activities occurring within this State.[6] Thus, the business and occupation tax bears a fair relationship or apportionment to business activity in this State because the tax is imposed based on the value of the business activity occurring within the State. *See Virginia Foods of Bluefield, Virginia, Inc. v. Dailey, supra*. As earlier pointed out, the question of proportionality is also viewed from the prospective [sic] of the services and benefits rendered by the State to all of the activities of the taxpayer occurring within the State as illustrated by this quotation from *General Motors Corp. v. Washington*, 377 U.S. at 441, 12 L.Ed.2d at 435, 84 S.Ct. at 1568:

6 "W. Va. Code, 11-13-2, *et seq.*, imposes a business and occupation tax on the following activities: severance of coal and other natural resources; manufacturing; selling tangible property; public service or utility business; contracting; operating amusements; service business not otherwise taxed; furnishing property for hire; small loan and industrial loan business; banking and other financial business."

> "[T]he question is whether the State has exerted its power in proper proportion to appellant's activities within the State and to appellant's consequent enjoyment of the opportunities and protections which the State has afforded."

That this test has continuing validity is amply demonstrated by *Commonwealth Edison Co. v. Montana*, 453 U.S. 609, 626-27, 69 L.Ed.2d 884, 900, 101 S.Ct. 2946, 2958-59 (1981), where the Court in sustaining Montana's coal severance tax, which could equal thirty percent of the contract sales price, stated:

> "The 'operating incidence' of the tax, see *General Motors Corp. v. Washington*, 377 U.S., at 440-441 [12 L.Ed.2d 430, 435, 84 S.Ct. 1564, 1568] is on the mining of coal within Montana. Because it is measured as a percentage of the value of the coal taken, the Montana tax is in 'proper proportion' to appellants' activities within the State and, therefore, to their 'consequent enjoyment of the opportunities and protections which the State has afforded' in connection with those activities. *Id.*, at 441 [12 L.Ed.2d 430, 435, 84 S.Ct. 1564, 1568]. Cf. *Nippert v. Richmond*, 327 U.S., at 427 [90 L.Ed. 760, 66 S.Ct. 586, 162 A.L.R. 844].
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> "When a tax is assessed in proportion to a taxpayer's activities or presence in a State, the taxpayer is shouldering its fair share of supporting the State's provision of 'police and fire protection, the benefit of a trained work force, and "the advantages of a civilized society." ' *Exxon Corp. v. Wisconsin Dept. of Revenue*, 447 U.S., at 228 [65 L.Ed.2d 66, 84, 100 S.Ct. 2109, 2123], quoting *Japan Line, Ltd. v. County of Los Angeles*, 441 U.S., at 445 [60 L.Ed.2d 336, 345, 99 S.Ct. 1813, 1819-20]."

Moreover, in *Department of Revenue of Washington v. Association of Washington Stevedoring Cos., supra*, where the Supreme Court sustained the state's business and occupation tax on Stevedoring's activity and overruled two prior cases which had invalidated such a tax, the Court speaking of apportionment said:

> "When a general business tax levies only on the value of services performed within the State, the tax is properly apportioned and multiple burdens logically cannot occur." 435 U.S. at 746-47, 55 L.Ed.2d at 695, 98 S.Ct. at 1397.

Of some interest is *Mobil Oil Corp. v. Commissioner of Taxes*, 445 U.S. 425, 63 L.Ed.2d 510, 100 S.Ct. 1223 (1980), where Mobil challenged Vermont's right to include in its apportioned income tax formula dividend income from its foreign subsidiaries and affiliates. It contended there was no fair apportionment since none of the foreign corporations had any contact with Vermont. The Court found that under the unitary business concept the general corporation did business in the state and stated:

> "Mobil's business entails numerous 'taxable events' that occur outside Vermont. That fact alone does not prevent the State from including income earned from those events in the preapportionment tax base.
>
> ". . . One must look principally at the underlying activity, not at the form of investment, to determine the propriety of apportionability.
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> ". . . Had appellant chosen to operate its foreign subsidiaries as separate divisions of a legally as well as a functionally integrated enterprise, there is little doubt that the income derived from those divisions would meet due process requirements for apportionability. Cf. *General Motors Corp. v. Washington*, 377 U.S. 436, 441, 12 L.Ed.2d 430, 84 S.Ct. 1564 (1964)." 445 U.S. at 440-41, 63 L.Ed.2d at 523, 100 S.Ct. at

Finally, when we look to other states that utilize a business and occupation tax, we find their decisions reject the need to make proportional their business and occupation tax because some of the events occur outside of the state. For example, in *Ramsay Travel, Inc. v. Kondo*, 53 Hawaii 419, 495 P.2d 1172 (1972), travel agents operating in Hawaii were taxed on income derived from commissions on ticket sales for transportation, lodging and sightseeing tours which activities occurred in other

states and foreign countries. The taxpayer contended that the tax should be apportioned because most of the services that generated revenues upon which the tax was levied were performed outside Hawaii. In rejecting this contention, the court stated:

> "[T]hey [taxpayers] would have to show that the state has failed to exert its power of taxation in proper proportion to their activities within the state and to their 'consequent enjoyment of the opportunities and protections which the state has afforded.' *General Motors Corporation v. Washington, supra*, 377 U.S. at 441, 84 S.Ct. at 1568. The taxpayers have failed to make any such showing." 53 Hawaii at 425, 495 P.2d at 1177.

The same result was reached in *McKinnis Travel Service, Inc. v. State*, 78 Wash.2d 229, 472 P.2d 392 (1970), and *Pan American Airways, Inc. v. Duly Auth. Gov. of Virgin Islands*, 459 F.2d 387 (3d Cir. 1972).

The issue of taxation of the income of an out-of-state lessor derived from the leasing of television and film rights to local television stations was involved in *Matter of Heftel Broadcasting Honolulu, Inc.*, 57 Hawaii 175, 554 P.2d 242 (1976), *cert. denied*, 429 U.S. 1073, 50 L.Ed.2d 791, 97 S.Ct. 811 (1977). The taxpayer asserted that all of the products covered by the license agreement were made out of state. The court however found that the license agreement gave the out-of-state lessor local dominion over the telecast and this provided a sufficient nexus to permit the entire revenue from the license agreement to be subject to Hawaii's business and occupation tax. *See also Matter of Grayco Land Escrow Ltd.*, 57 Hawaii 436, 559 P.2d 264 (1977); *Collector of Revenue v. Wells Fargo Leasing Corp.*, 393 So.2d 1244 (La. 1981).

It is obvious from these decisions that a state tax cannot be defeated on Due Process Clause or Commerce Clause grounds merely because the value of out-of-state activity as it relates to the subject of the tax, whether the subject be products or services, is greater than the value of in-state activity. There is also the need to consider the protection, benefit, and oppor-

tunities afforded by the state in this overall equation relating to proportionality. Certainly, when Armco's total business activity is viewed in this State, it enjoys numerous benefits and protections afforded by the State, including fire and police protection and a host of social legislation.

III.

Armco claims that at least as to our business and occupation tax on its wholesale activity there is actual discrimination against an out-of-state manufacturer. This argument is predicated on the language of W. Va. Code, 11-13-2,[7] which gives an exemption to those engaged in severing or extracting natural resources (W. Va. Code, 11-13-2a) and manufacturers (W. Va. Code, 11-13-2b) who sell their products to other manufacturers, wholesalers, or retailers. Such persons are not required to pay a further business and occupation tax on these sales. Consequently, Armco contends that as an out-of-state manufacturer which is selling products at wholesale in this State, it does not gain the benefit of this exemption and must pay a business and occupation tax on these sales under W. Va. Code, 11-13-2c.

The tax commissioner argues and, we believe correctly, that Armco's discrimination argument overlooks several key points. First, the same exemption is available for an out-of-state corporation which is engaged in manufacturing in this State when it sells its products at wholesale within the State. Therefore, the tax is not facially discriminatory. Second, the fact that Armco does not manufacture within this State some

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7 The pertinent language of W. Va. Code, 11-13-2, in effect during the tax years involved in the present case, was:

> "But any person exercising any privilege taxable under sections two-a or two-b [§ 11-13-2a or 11-13-2b] of this article and engaging in the business of selling his natural resources or manufactured products to producers of natural resources, manufacturers, wholesalers, jobbers, retailers or commercial consumers for use or consumption in the purchaser's business shall not be required to pay the tax imposed in section two-c [§ 11-13-2c] of this article."

of the products that it sells in this State means that it is not subject to the business and occupation tax on manufacturing under W. Va. Code, 11-13-2b. This tax is imposed on an in-state manufacturer at a rate of eighty-eight one-hundredths of one percent of the gross proceeds of the sale. The tax rate on wholesale sales under W. Va. Code, 11-13-2c, is twenty-seven one-hundredths of one percent. Thus, a manufacturer in West Virginia pays a substantially higher tax than a wholesaler.

Where a state tax is claimed to be discriminatory, the United States Supreme Court has traditionally held that the particular tax must be surveyed along with other relevant provisions of the State's tax laws as summarized in *Maryland v. Louisiana*, 451 U.S. 725, 756, 68 L.Ed.2d 576, 601, 101 S.Ct. 2114, 2134 (1981):

> "A state tax must be assessed in light of its actual effect considered in conjunction with other provisions of the State's tax scheme. 'In each case it is our duty to determine whether the statute under attack, whatever its name may be, will in its practical operation work discrimination against interstate commerce.' *Best & Co. v. Maxwell*, 311 U.S. 454, 455-456, 85 L.Ed. 275, 61 S.Ct. 334 (1940)."

Armco places particular emphasis on *Boston Stock Exchange v. State Tax Commissioner*, 429 U.S. 318, 50 L.Ed.2d 514, 97 S.Ct. 599 (1977), where the Supreme Court struck down New York's stock transfer tax. The effect of the tax was to permit a fifty percent reduction in the tax when the stock was sold in-state and by placing a maximum tax limit of $350 when there was an in-state sale. Certain regional out-of-state stock exchanges filed suit claiming that the tax was discriminatory since it was imposed on the transfer of the stock certificates in New York but if the actual sale were made out-of-state a higher rate was charged than if the stock was sold on the New York Stock Exchange. Thus, a competitive advantage was given to the New York Exchange in violation of the Commerce Clause.

We do not believe that *Boston Stock Exchange* is controlling as it dealt with a single tax which contained rate differentials

favoring in-state sales. Here, we are dealing with two separate taxes—the manufacturer's business and occupation tax with its exemption for in-state wholesale sales, and the business and occupation tax on wholesalers.

Our situation is more analogous to *Alaska v. Arctic Maid*, 366 U.S. 199, 6 L.Ed.2d 227, 81 S.Ct. 929 (1961), which involved a four percent tax on the value of fish caught in Alaskan waters by freezer ships and other cold storage ships and which were taken to and canned in the State of Washington. The taxpayer complained that this tax discriminated in favor of local fish processors who caught fish, and sold them on the local market and who paid a lower tax. The Court in upholding the tax stated:

> "If there is a difference between the taxes imposed on these freezer ships and the taxes imposed on their competitors, they are not so 'palpably disproportionate' (*International Harvester Co. v. Evatt*, 329 U.S. 416, 422 [91 L.Ed. 390, 395, 67 S.Ct. 444, 447] as to run afoul of the Commerce Clause. No 'iron rule of equality' between taxes laid by a State on different types of business is necessary. *Caskey Baking Co. v. Virginia*, 313 U.S. 117, 119-121 [85 L.Ed. 1223, 1226-27, 61 S.Ct. 881, 882-83]; *Morf v. Bingaman*, 298 U.S. 407, 414 [80 L.Ed. 1245, 1250, 56 S.Ct. 756, 759]; *Capitol Greyhound Lines v. Brice*, 339 U.S. 542, 546-47 [94 L.Ed. 1053, 1056-57, 70 S.Ct. 806, 809, 17 A.L.R.2d 407]." 366 U.S. at 205, 6 L.Ed.2d at 231, 81 S.Ct. at 932.

It is important to recall that Armco as an out-of-state manufacturer of products which it sells at wholesale in this State is not subject to any business and occupation tax as a manufacturer in this State. Thus, its complaint is the same that can be made by all persons who are making wholesale sales in this State, i.e. they are taxed at the wholesale rate but a manufacturer who is taxed at a much higher rate on the value of the product is exempt when he sells the same product at wholesale. We do not believe that under *Alaska v. Arctic Maid*,

supra, a showing of discrimination has been made between these two different taxes as they relate to interstate commerce.[8]

The final thrust by the taxpayer is that the exemption in W. Va. Code, 11-13-2, violates our own equal and uniform constitutional provision. W. Va. Const. art. X, sec. 1. Again, we advert to the fact that two distinct categories of business and occupation taxes are at issue: the manufacturing category which carries a much higher tax rate but permits an exemption for wholesale sales made by the manufacturer, and the wholesale tax.

Our Equal and Uniform Clause as it relates to our business and occupation tax was discussed in *United Fuel Gas Co. v. Battle*, 153 W. Va. 222, 250-51, 167 S.E.2d 890, 906 (1969), *appeal dismissed*, 396 U.S. 116, 24 L.Ed.2d 309, 90 S.Ct. 398, and this summary was given based on our earlier cases:

> "In *Arslain v. Alderson*, 126 W. Va. 880, 30 S.E.2d 533, this Court used this language: 'Unless the power of the Legislature over a subject matter is negatived by the Constitution, the Legislature has plenary power. * * *. We know of no provision of the Constitution which requires that the same rate be applied to all classes of businesses and callings on which privilege taxes are assessed. The Legislature may prescribe rates for different businesses and callings, but the rate of taxation must be uniform and equal within the classification and, if so, we see no constitutional objection thereto.' In *Appalachian Electric Power Company v. Koontz*, 138 W. Va. 84, 76 S.E.2d 863, this Court said that 'taxes need be equal and uniform only as to the same class of business,'."

It requires no great feat of imagination to conclude that the Legislature in placing the business and occupation tax on manufacturing at eighty-eight one hundredths of one percent

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8 The taxpayer cites *Columbia Steel Co. v. Tax Commissioner*, 30 Wash.2d 658, 192 P.2d 976 (1948), which involved a rather similar business and occupation tax provision which the court held unconstitutional. This was before *Alaska v. Arctic Maid*, *supra*, which we believe to be controlling.

realized that a manufacturer would also have to dispose of the product either through wholesale or retail sales and that it would be unfair to impose an additional tax on this transaction. Therefore, it created the exemption found in W. Va. Code, 11-13-2. We believe that wholesalers who are taxed at the much lower rate of twenty-seven one hundredths of one percent cannot complain under our equal and uniform taxation principles because the Legislature has seen fit to exact a higher tax on manufacturers and exempt them from wholesale sales.[9] We, therefore, conclude that because the manufacturer's business and occupation tax and the wholesale tax involves separate classes of tax incidents that the exemption for wholesales by manufacturers does not violate the Equal and Uniform Clause of Section 1 of Article X of the West Virginia Constitution.

Under the foregoing principles, the judgment of the Circuit Court of Kanawha County is reversed and the case is remanded.

Reversed and Remanded.

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9 Although not argued by the tax commissioner, it would seem that the Legislature also recognized that in imposing the manufacturer's tax "equal to the value of the article . . . as shown by the gross proceeds derived from the sale thereof" that the very sale that would measure the manufacturer's tax could be a wholesale sale. Consequently, it would be unfair to assess in effect a manufacturing tax on this sale and at the same time assess the manufacturer with a wholesale tax.

Appendix B

OPINION OF THE CIRCUIT COURT OF KANAWHA COUNTY, WEST VIRGINIA

STATE OF WEST VIRGINIA

THIRTEENTH JUDICIAL CIRCUIT

KANAWHA COUNTY COURTHOUSE

CHARLESTON, WEST VIRGINIA 25301

ROBERT K. SMITH
Judge

December 30, 1980

G. Thomas Battle, Esquire
Spilman, Thomas, Battle & Klostermeyer
P.O. Box 273
Charleston, West Virginia 25321

Robert Digges, Jr., Esquire
Assistant Attorney General
Tax Division
State Capitol Building No. 1
Room No. W-435
Charleston, West Virginia 25305

Re: Armco, Inc., an Ohio corporation
v.
David C. Hardesty, Jr., as
Tax Commissioner of the
State of West Virginia
Civil Action No. AP-CA-78-8

Gentlemen:

This appeal involving the business and occupation tax is before this Court pursuant to the provisions of West Virginia Code, 11-13-8 (1963), in effect at the time of the filing of this appeal. This case was reassigned to the undersigned as a result

of Judge McHugh's departure to the West Virginia Supreme Court of Appeals.

The issue in this case is whether the wholesale sales classification of the West Virginia business and occupation tax (West Virginia Code, 11-13-2, first paragraph, and -2c) is applicable to interstate sales of goods delivered by common carrier to customers in this state from out-of-state locations of certain product divisions of a foreign corporation, where the only activity by those divisions in this state is personal solicitation of product orders by nonresident traveling salesmen in the following manner: four salesmen devoting part of their time in visiting West Virginia customers on an average frequency of once every four to six weeks (Steel Group); one of three salesmen devoting part of his time in visiting West Virginia customers on an average frequency of once or twice a month (Union Wire Rope Group). About eight percent of these divisions' total sales in terms of dollars are to West Virginia customers and about 77 percent of these West Virginia sales are to three customers whose orders are solicited without this state.

The Court holds that these sales are not taxable. For these sales the taxpayer is not "engaging or continuing within this state in the business of selling". The Court recognizes that "there is no doubt that the present trend of the Supreme Court (of the United States and of the Supreme Court of Appeals of this state) is to uphold state taxes (imposed by the state of destination) against the claim that they impinge on the Commerce or Due Process Clauses." *J. C. Penney Co. v. Hardesty*, ____ W. Va. ____, ____, 264 S.E.2d 604, 616 (1979) (Miller, J., concurring). Chief Justice Neely, writing the majority opinion in the same case, struck this same chord: "(A) gross receipts tax may be levied in the state of delivery if there are sufficient contacts to create a tax nexus but cannot be levied in the state of manufacture." 264 S.E.2d at 612. Thus, quoting a law review article by a leading authority in this area, Chief Justice Neely also states the trend: " '(A)ssuming that nexus requirements have been satisifed, over the past four decades gross receipts taxes on interstate sales have generally been sustained when imposed by the state to which the goods were shipped

and prohibited when imposed by the state from which the goods were sent.' " *Id.* Utilizing this identical language the Supreme Court of Appeals of this state also noted this trend in the taxability of "inshipments" as opposed to "outshipments" in *Virginia Foods of Bluefield, Virginia, Inc. v. Dailey,* ____ W. Va. ____, ____, 239 S.E.2d 770, 777 (1977).

This trend of taxability of inshipments by the state of destination is contingent, however, upon the presence of four factors expressed in the landmark opinion of the Supreme Court of the United States, *Complete Auto Transit, Inc. v. Brady,* 430 U.S. 274, 279, 51 L. Ed. 2d 326, 331, 97 S. Ct. 1076, ____ (1977). The Supreme Court of Appeals of this state "wholeheartedly welcome(d) *Complete Auto*'s departure from semantic formalism and its emphasis on functional economic analysis." *Chesapeake & Potomac Telephone Co. v. State Tax Department,* ____ W. Va. ____, ____, 239 S.E.2d 918, 925 (1977). For purposes of the case *sub judice* it is necessary to examine only the first factor stated in *Complete Auto Transit*'s amalgamated Due Process/Commerce Clause analysis, namely, "the tax (must be) applied to an *activity* with a *substantial* nexus with the taxing State". (underscoring added by this Court)

The Court notes that the nexus or connection must be substantial and must be between the taxing state and the activity or transaction in question, not merely between the state and the "person" of the taxpayer in the sense that there is substantial nexus between the taxing state and other, unrelated activities of the taxpayer. This is an example of "functional, economic analysis."

In this case the solicitation on a part-time basis in this state by the nonresident traveling salesmen does not constitute a "substantial nexus". In *Norton Co. v. Department of Revenue,* 340 U.S. 534, 537, 538, 95 L. Ed. 517, 520, 521, 71 S. Ct. 377, ____, ____ (1951), the Supreme Court of the United States supplied the analysis which is equally applicable to this case:

> Where a corporation chooses to stay at home in all respects except to send abroad advertising or drummers to solicit orders which are sent directly to the home office

> for acceptance, filling, and delivery back to the buyer, it is obvious that the state of the buyer has no local grip on the seller. Unless some local incident occurs sufficient to bring the transaction within its taxing power, the vendor is not taxable. . . .
>
> . . . .
>
> This corporation could have approached the Illinois market through solicitors only and it would have been entitled to the immunity of interstate commerce . . . .

Although exclusively interstate commerce is no longer viewed as *per se* immune from a privilege tax under the Commerce Clause (*Complete Auto Transit, Inc. v. Brady*, 430 U.S. 274, 51 L. Ed. 2d 326, 97 S. Ct. 1076 (1977), *supra*), the "substantial nexus" test of *Complete Auto Transit* still requires a "local grip on the seller" for the activity in question. *Norton* stands for the proposition that nonresident solicitation, like network television advertising or direct mail solicitation, although instrumental in obtaining product orders, is not a local incident sufficiently separable from the stream of interstate commerce. In short, in the case of nonresident solicitation, instead of there being a local incident, " '(i)nterstate commerce itself knocks on the local door.' " *Memphis Steam Laundry Cleaner, Inc. v. Stone*, 342 U.S. 389, 393, 96 L. Ed. 436, 440, 72 S. Ct. 424, ____ (1952).

Norton also held that a tax on interstate commerce can be avoided by a "showing that particular transactions are dissociated from the local business . . . . " 340 U.S. at 537, 95 L. Ed. at 520-21, 71 S. Ct. at ____. The taxpayer in the case *sub judice* has met its burden of showing that no local presence contributes to the interstate business.

Norton remains valid even after *Complete Auto Transit. National Geographic Society v. California Board of Equalization*, 430 U.S. 551, 560, 51 L. Ed. 2d 631, 639-40, 97 S. Ct. 1386, ____ (1977), decided less than one month after *Complete Auto Transit*, quoted *Norton* for the transactional "dissociation" principle for "direct" taxes like the business and occupation tax, thereby repudiating the applicability to such direct

taxes of the "borrowed nexus" theory held applicable to use tax collection duties of an out-of-state seller. The "borrowed nexus" theory, much like the "bundle of corporate activity" test of *General Motors Corp. v. Washington*, 377 U.S. 436, 12 L. Ed. 2d 430, 84 S. Ct. 1564 (1964), requires only a connection between the taxing state and the "person" of the taxpayer. It must be remembered that there was "a maze of local connections" in *General Motors*. 377 U.S. at 448, 12 L. Ed. 2d at 439, 84 S. Ct. at ____. Here, by contrast, there is only one intrastate office and it sells a line of products entirely dissimilar to the product lines of the interstate business.

Standard Pressed Steel Co. v. Washington Department of Revenue, 419 U.S. 560, 42 L. Ed. 2d 719, 95 S. Ct. 706 (1975), and *Virginia Foods of Bluefield, Virginia, Inc. v. Dailey*, ____ W. Va. ____, 239 S.E.2d 770 (1977), are distinguishable. Both of these cases speak in terms of "substantial" local or intrastate activities "which make possible the realization and continuance of valuable contractual relations" and "which are essential to the establishment and maintenance of sales" (the latter clause also contained in *General Motors, supra*). Note that there must be substantial local or intrastate activities. Here, there are none. *Norton, supra*. For example, in both *Standard Pressed Steel* and *Virginia Foods* there was at least one *resident* representative of the foreign corporation who worked full time within the taxing state, which is not the case here. *Standard Pressed Steel* discusses *Norton* approvingly. 419 U.S. at 562-63, 42 L. Ed. 2d at 722-23, 95 S. Ct. at ____.

The following description of the local activities in *Virginia Foods* indicates clearly the much greater nexus in that case than here:

(1) The taxpayer employed four full-time sales representatives, two of whom were West Virginia residents, and one of whom worked exclusively within West Virginia;

(2) The taxpayer furnished West Virginia customers with monthly catalogues and weekly revisions to facilitate customer orders;

(3) The taxpayer arranged for its representatives to periodically visit grocery stores in West Virginia, inventory the non-

food items on the West Virginia customers' shelves, and generally make out an order form for authorization by store management;

(4) The taxpayer delivered orders in its own trucks, with title and risk of loss passing upon delivery to the customer;

(5) As a distributor and franchising agent for IGA, the taxpayer solicited and obtained IGA franchise business from individual store owners in West Virginia;

(6) Once the taxpayer obtained a franchise, it consulted with the franchisee, helped the franchisee with promotional material, and assisted with general business planning under the IGA scheme;

(7) The taxpayer derived 44 percent of the gross sales in the three-state area (West Virginia, Virginia and Kentucky) from West Virginia customers as a result of the on-going, day-to-day operations in West Virginia.

The Court in *Virginia Foods* emphasized in Syllabus point 1 of its opinion that each case in this area turns upon the facts and circumstances. As demonstrated, the facts and circumstances here are materially different from those in *Virginia Foods.*

Sales of metal buildings by the subgroup of the Metal Products Division are also not taxable. Franchised dealers of the metal buildings are not even personally solicited within this state. There is no physical presence at all in West Virginia by the metal buildings subgroup of the Metal Products Division. The dealer may use the taxpayer's name and trademark, and the taxpayer shares advertising expenses with the dealer. This Court is not aware of any decision by the Supreme Court of the United States which requires only an economic exploitation of the market without any direct physical presence to uphold a direct tax. The Court is aware of one state court case involving a corporate income tax which proclaims this theory. *American Refrigerator Transit Co. v. State Tax Commission,* 238 Or. 340, ____, 395 P.2d 127, 130-31 (1964). The validity of this case in light of 15 U.S.C. § 381, as amended, may be questioned.

The Court is also aware of the holding in *Scripto, Inc. v. Carson,* 362 U.S. 207, 211, 4 L. Ed. 2d 660, 664, 80 S. Ct. 619, ____ (1960), that the label of a representative in the taxing state as an "independent" contractor, as opposed to an employee, does not exempt an out-of-state seller from the duty of collecting a use tax. *Scripto* is not persuasive precedent here, however, because it involved the collection of a use tax while a direct tax on the seller is involved here. *National Geographic, supra,* 431 U.S. at 560, 51 L. Ed. 2d at 639-40, 97 S. Ct. at ____. Moreover, the franchised dealers here are clearly acting almost entirely for their own benefit when they resell the buildings to their customers, rather than acting as the taxpayer's representative. West Virginia has jurisdiction to tax sales in this state by the franchised dealers, but not the sales by the taxpayer to the franchised dealers. That the dealers may display the taxpayer's name and trademark is *de minimus* nexus in the form of local advertising of a limited nature.

For the reasons articulated this Court reverses the tax commissioner's rulings on these issues and vacates the portion of the assessment challenged on this appeal relating to interstate sales.

An order in conformity herewith should be promptly tendered for entry. Such order should make this letter memorandum of opinion a part thereof. A copy for that purpose may be obtained from my secretary upon presentation of the order.

Very truly yours,

/s/ ROBERT K. SMITH
Robert K. Smith

RKS/dkp

ORDER OF THE CIRCUIT COURT OF KANAWHA COUNTY, WEST VIRGINIA

STATE OF WEST VIRGINIA
At a Circuit Court for Kanawha County held at the Court House thereof on the 20th day of July 1981.

IN THE CIRCUIT COURT OF KANAWHA COUNTY, WEST VIRGINIA

CIVIL ACTION NO. AP-CA-78-8

(Judge Smith)

ARMCO INC., an Ohio corporation,

Plaintiff,

—v.—

DAVID C. HARDESTY, JR., as Tax Commissioner of the State of West Virginia,

Defendant.

ORDER

This matter having come before the Court upon a Notice of Appeal filed by plaintiff, Armco Inc., an Ohio corporation, pursuant to the provisions of Chapter 11, Article 13, Section 8 of the Code of West Virginia of 1931, as amended, from a decision of the defendant, State Tax Commissioner of West Virginia, dated December 10, 1977, holding plaintiff liable to the State of West Virginia for business and occupation tax on the gross income from the sale of tangible property to customers in West Virginia; upon the answer of the defendant; upon the record made at an administrative hearing held on

May 23, 1977, all of which is made a part of the record herein; upon oral argument of counsel for the parties hereto; and upon written briefs filed by counsel for the respective parties.

Upon consideration whereof, the Court rendered a letter memorandum of opinion dated the 30th day of December, 1980, a copy of which is attached hereto, filed herein, and made a part of the record hereof, finding that the imposition of business and occupation tax upon the gross income of plaintiff's Steel Group, Union Wire Rope Group and metal building sales, as affirmed by the Administrative Decision made by the defendant against the plaintiff, was erroneous and should be reversed. The assessment as affirmed by Administrative Decision of the State Tax Commissioner of West Virginia is accordingly reversed as to the aforesaid transactions.

Therefore, it is ORDERED, ADJUDGED and DECREED that the Administrative Decision of the defendant Tax Commissioner dated December 10, 1977, File No. 31 020 0500 004, is hereby reversed, and the assessment of business and occupation tax against the plaintiff, Armco Inc., as affirmed by the defendant State Tax Commissioner, for the period January 1, 1970 through December 31, 1975, is hereby reversed in accordance with the findings contained in the letter memorandum of opinion of this Court dated the 30th day of December, 1980, to which findings the defendant respectfully objects and excepts.

It is FURTHER ORDERED that inasmuch as the defendant State Tax Commissioner, in determining the plaintiff's overpayment of business and occupation tax as found in defendant's Administrative Decision, reduced the amount of said overpayment by the amount of tax assessed with respect to the transactions which were the subject of this appeal, the plaintiff is entitled to the full amount of its overpayment of business and occupation tax without reduction for the tax assessed by the defendant on direct sales to West Virginia customers made by plaintiff's Steel Group, Union Wire Rope Group and the tax paid by plaintiff on metal buildings sold by the Metal Products Division subgroup.

To which ruling the defendant objects and excepts.

Dated this 20th day of July, 1981.

ENTER:

/s/ ROBERT K. SMITH
Judge of the Circuit Court of
Kanawha County, West Virginia

Presented by:

/s/ G. THOMAS BATTLE
G. Thomas Battle
Attorney for Plaintiff

Inspected by:

/s/ ROBERT DIGGES, JR.
Robert Digges, Jr.
Attorney for Defendant

STATE OF WEST VIRGINIA
COUNTY OF KANAWHA, SS.

I, Phyllis Jean Cole, Clerk of the Circuit Court of said County and in said State, do hereby certify that the foregoing is a true copy from the records of said Court.

Given under my hand and the seal of said Court 20th day of July 1981

/s/ PHYLLIS JEAN COLE
Clerk
Circuit Court
Kanawha County, West Virginia

Appendix C

ADMINISTRATIVE DECISION OF THE TAX DEPARTMENT OF WEST VIRGINIA

[SEAL]

STATE TAX DEPARTMENT OF WEST VIRGINIA

Charleston 25305

BEFORE THE TAX COMMISSIONER
OF THE STATE OF WEST VIRGINIA

BUSINESS TAX DIVISION

Docket # 77-105 B

File No. 31 020 0500 004

In the Matter of the Petition of

ARMCO STEEL CORPORATION
Tax Department
703 Curtis Street
Middletown, Ohio 45043

HEARING EXAMINER HOLDING HEARING:

Frank Skinner

TAXPAYER REPRESENTED BY:

G. Thomas Battle, Attorney at Law
Michael Wink, Attorney at Law
James D. Ryan, Tax Attorney, Armco Steel Corporation
Eugene J. Dabkowski, Senior Tax Administrator
Carl Obemeier, Controller
Frank Deitsch, Controller
Clayton Condry, Engineer

William Martin, Purchaser
Herbert M. Geary, District Sales Manager
Robert E. Weiford, Metal Products Division
E. D. Conaway, Chief Engineer, Robinson and Robinson, Division of NUS Corporation

TAX COMMISSIONER REPRESENTED BY:

William C. Miller II, Director, Legal Division
Michael Stajduhar, Tax Analyst
R. Michael Reed, Tax Analyst
Russell Miller, Auditing Section
H. Irvin Hoffman, Tax Examiner

DATE, TIME AND PLACE OF HEARING:

May 23, 1977, 10:00 a.m., EDT
State Tax Department
Office of Hearings and Appeals
1217 Quarrier Street
Charleston, West Virginia 25301

ADMINISTRATIVE DECISION

Pursuant to a field audit conducted by the Business Tax Division, Richard L. Dailey, then Tax Commissioner of the State of West Virginia, issued an assessment against Armco Steel Corporation (herein also referred to as the taxpayer or the petitioner) on January 5, 1977 for business and occupation tax in accordance with the provisions of Chapter 11, Article 13 of the Code of West Virginia of 1931, as amended. The assessment was for the period 1970 through 1975 for tax in the amount of $480,028.36 with penalty thereon in the amount of $237,942.54 for a total assessed tax and penalty in the amount of $717,970.90.

Taxpayer filed a timely petition for reassessment and the cause was regularly set for hearing after due notice was given to and received by the taxpayer.

The Hearing Examiner, Frank Skinner, having determined that all proper notices and documents required by law had been timely filed, called the matter on to be heard at 10:00 a.m., EDT on the 23rd day of May, 1977, in the State Tax Department at Charleston, West Virginia.

FACTS

Armco Steel Corporation is an Ohio corporation which qualified to do business in West Virginia in 1938. The taxpayer is primarily engaged in the business of manufacturing and selling steel products. To implement its primary business objective, the taxpayer also severs and extracts coal from its mines in West Virginia and purchases coal from other producers in West Virginia. Coal from both sources is prepared for use at the taxpayer's tipples located in West Virginia.

The present assessment arose as a result of a State audit of the taxpayer's books and records which indicated that the taxpayer had erroneously understated the value of its produced coal in the years 1970, 1971, 1972, 1973 and 1975, had failed to report the production value of coal consumed at its preparation plant during the entire audit period, and had failed to report the total coal production shipped to its plants in 1974. It was also found that the taxpayer had failed to report the value of coal purchased and processed at its preparation plant in the years 1970 through 1974 under the manufacturing classification. Finally, it was indicated that the taxpayer had failed to report sales of dealer aids, scrap material, materials shipped into West Virginia by its Union Wire Rope Division, and steel shipped into West Virginia.

At the hearing held on this matter, the taxpayer's counsel accepted the auditor's findings of additional tax liability under the coal production classification as reflected in the assessment for all years except 1974. In the year 1974, the petitioner's counsel contended that the audit as finally prepared reflected a value for coal produced by the taxpayer in an amount greatly exceeding the actual produced value of that coal.

Under the manufacturing classification, the taxpayer accepted the audit findings except for the value assigned to coal purchased and processed by it in 1974.

Under the wholesale sales classification, the taxpayer took no exception to the inclusion of scrap sales made by its coal mining operations nor of the sales of dealer sales aids made by its office located in South Charleston, West Virginia. However, the taxpayer did object to the inclusion in the assessment under the wholesale sales classification of the proceeds of sales by its Union Wire Rope operation and also of the proceeds from the sale of steel products shipped from points outside West Virginia to points inside West Virginia other than those sales attributable to the activities of its Metal Products Division Office located in South Charleston, West Virginia.

The dispute over the proper valuation of the taxpayer's high volatile metallurgical coal production for the year 1974 arises because the taxpayer maintains that it substantially overvalued this coal for business and occupation tax purposes on its original 1974 tax returns. The taxpayer's representative explained that this excessive valuation resulted because the taxpayer does not sell the coal produced by it in West Virginia, except for very insignificant sales to employees and a few others at a price near the taxpayer's cost. Therefore, the taxpayer has no specific sales value for its coal to report for business and occupation tax purposes. Prior to 1974, the taxpayer computed the production value of its coal production on the basis of the taxpayer's cost of producing its coal in accordance with directions received as a result of a prior State audit performed in the early 1960s. However, as the market price of coal continued to increase the taxpayer felt that the cost method of valuation was no longer sufficient. In 1974, the taxpayer decided to find a new source of figures from which to compute the production value of its coal. The taxpayer contacted its purchasing department in an attempt to find the price received by other similarly situated major coal sellers for coal of like quality purchased by the taxpayer for use in its steel operations. However, the figures received by the taxpayer actually reflected "spot market" purchase prices, which are generally much higher than purchases made under long-term contracts, and the purchase price under one long-term contract. From these sources, the taxpayer arrived at a figure of

$38.90875 per ton as the reportable production value of its coal in 1974. The taxpayer then reported and paid its business and occupation tax obligation under the production classification based on that figure.

When the present State audit was performed, the auditor found that the taxpayer had understated the production value of its coal in the years 1970 through 1973 and the year 1975. The production values in these years were adjusted upward by the auditor based on figures supplied to the taxpayer by Eastern Associated Coal Company, herein also called Eastern. Eastern mined metallurgical coal of a quality similar to the taxpayer's coal on the same lease mined by the taxpayer. The figures were derived from sales of metallurgical coal made by Eastern primarily under long-term contracts. The accuracy of these sales figures was periodically verified by an independent accounting firm employed by the lessor of the tract mined by the taxpayer and Eastern because these sales figures were used to compute additional royalties payable by the taxpayer and Eastern to the lessor. The use of these figures in place of the original cost figures by the auditor resulted in the following production value increases during the audit period: 1970—from $6.14 to $7.261 per ton; 1971—from $7.85 to $8.56 per ton; 1972—from $8.81 to $9.58 per ton; 1973—from $10.46 to $12.361 per ton, and 1975—from $24.94 to $30.10 per ton. In 1974, if the Eastern sales figure had been used to compute the taxpayer's final tax liability under the production classification the value reported by the taxpayer at $38.90875 per ton would have been reduced to $19.801 per ton. However, this downward adjustment for 1974 was not made in the final computation of the audit. Another source of high volatile metallurgical coal sales value figures introduced into the record was a long-term contract between the taxpayer as purchaser and General Coal Company entered into on April 1, 1972 under which the taxpayer purchased coal in the amount of 189,525 tons at $12.86 per ton in 1972; 180,934 tons at $14.10 per ton in 1973; 235,270 tons at $26.32 per ton in 1974; and 331,241 tons at $40.23 per ton in 1975.

Finally, the taxpayer's representative elicited testimony from E. D. Conaway, a consulting mining engineer retained by the

taxpayer to testify concerning coal valuation, that the average value for West Virginia high volatile metallurgical grade coal similar to the coal mined by the taxpayer was $26.80 per ton in 1974. This value was reported in *Coal Week News Letter*, an industry publication and it included sales under long-term contracts and on the spot market.

Under the manufacturing classification, the taxpayer again only contested that portion of the assessment attributable to an alleged overvaluation of the coal manufactured in 1974. This alleged overvaluation resulted from the use of the $38.90875 per ton figure as reported by the taxpayer as the value of the coal produced at its own mines. The taxpayer purchased 287,863 tons of this coal at an average price of $10.15 per ton. It then processed the coal at its tipple in West Virginia. The coal is then shipped to the taxpayer's out-of-state steel plants and is consumed.

Under the wholesale portion of the assessment the taxpayer objected to the inclusion of sales of products manufactured at Armco plants outside West Virginia which are ultimately delivered to in-state purchasers. These sales are handled by three separate operating groups. These groups are identified as: Steel Group (Steel); Union Wire Rope (Wire Rope); and Metal Products Division (MPD).

The MPD is divided into two sub-groups, one handling construction and drainage products exclusively and the other handling metal buildings.

The only sales related office maintained by Armco in West Virginia is the MPD construction and drainage products office located in South Charleston. Employees associated with that office are residents of West Virginia, and sales of construction and drainage products processed through that office have been reported for business and occupation tax purposes.

The metal buildings sold through MPD are handled through the Columbus office of that division. The sales of these buildings are made by the taxpayer to dealers in West Virginia. During the audit period the sales of metal buildings to dealers in West Virginia totaled $3.4 million. These dealers then resell the buildings to their customers. The taxpayer has no salesmen

who enter West Virginia to solicit orders from these dealers. Rather, the dealers enter into an "Armco Building Dealer Agreement" by which the taxpayer appoints a specific seller as a dealer of its metal buildings. Under this agreement, the dealer is allowed to purchase buildings from the taxpayer and then resell them to the general public. The dealer may also use the taxpayer's name and trademark, and the taxpayer shares advertising expenses with the dealer.

Steel and Wire Rope operate in much the same way as MPD, but without individual sub-groups. Steel maintains offices around the country with salesmen assigned specific geographic territories. The Cincinnati, Ohio office and Pittsburgh, Pennsylvania office are responsible for West Virginia, and two salesmen from Cincinnati and two from Pittsburgh visit customers in West Virginia on an average frequency of four to six weeks. None of these salesmen are residents of West Virginia, and Steel maintains no offices or resident personnel in West Virginia.

Wire Rope has offices in Ashland, Kentucky; Pittsburgh, Pennsylvania; and Greensboro, North Carolina. A representative from one of these three offices visits West Virginia customers once or twice a month. None of these representatives are residents of West Virginia, and Wire Rope maintains no offices or sales or service personnel in the State.

Neither Steel nor Wire Rope maintain any inventory of finished goods in West Virginia nor do they own or rent motor vehicles licensed in the State. Neither of these groups install, service or repair products sold by them to customers in West Virginia.

The sales representatives of Steel and Wire Rope do not have authority to accept or reject orders, and the terms and conditions of sale provide that orders are subject to acceptance at the sellers' offices which are located outside of West Virginia, with the exception of the MPD construction and drainage products office in South Charleston. Goods are delivered to customers in West Virginia by common carrier, and the conditions of sale provide that title to the products shall pass upon delivery to the carrier at point of shipment which in each instance is outside West Virginia.

ISSUES AND DETERMINATIONS

The initial issue for determination in the present matter is whether the production value of high volatile metallurgical grade coal extracted and processed by the taxpayer in West Virginia during the year 1974 as originally reported by the petitioner and accepted by the State in its audit was in fact in excess of the actual produced value of high volatile metallurgical grade coal produced in West Virginia during that year.

The taxpayer made no fairly representative sale of this coal to others during the audit period. Rather, the taxpayer consumed the coal produced at its mines in its steel making processes or at its coal preparation plants. Because of the foregoing situation, a value must be affixed to this coal without the benefit of reference to actual receipts from sales made by the taxpayer.

The State's representative contends that the production value originally reported by the petitioner on its 1974 business and occupation tax return should be accepted as the actual value of that coal because this value was based on the price paid by the taxpayer on the open market for coal in 1974. At the hearing, the taxpayer's counsel adduced evidence which indicated that the figures on which the taxpayer's 1974 production was based primarily were derived from "spot market" purchases of coal by the taxpayer in that year. It was also shown that spot market purchases, by their very nature, fluctuated widely in price and were almost always greatly in excess of prices paid for coal purchased under long-term contracts. It was also explained that coal companies sell most of their coal under long-term contracts with the remainder of their production being sold on the spot market.

Business and occupation tax regulation BOT 6.52.III.A. effective through June 30, 1974 on minimum values assignable to natural resource products states that:

> Whenever a producer or manufacturer in addition to producing or manufacturing within the state purchases products or articles of like quality and character, whether within the state or without the state, then the highest price

paid by him during the taxable year for such products or articles shall be presumed to be their minimum value, unless the market conditions under which such price was paid are known to have been abnormal and the resulting price in excess of true value.

In the present case, it is apparent that the above-stated regulation is not controlling because the taxpayer has shown that its 1974 purchases were made on the spot market and the prices paid on that market are excessive and do not represent the normal purchase prices of coal in that period. The same conclusion must be reached concerning the taxpayer's purchases of coal made during that part of 1974 coming on and after July 1, 1974. Therefore, it is determined that the $38.90875 per ton figure reported by the taxpayer as the produced value of its coal in 1974 is excessive and must be reduced to a figure accurately reflecting the actual value of such coal in the existing market during that period.

The taxpayer contends that the proper value to place on its 1974 production of metallurgical grade coal is the value reported to it by Eastern Associated Coal for purposes of computing royalty payments due to their lessor. Eastern's coal was shown to be of a quality and amount comparable to the taxpayer's production and was extracted from the same lease mined by the taxpayer.

Business and occupation tax regulation BOT 6.52.I.B.(2), effective prior to July 1, 1974, dictates the following methods for determining the production value of coal consumed by its producer:

(a) By applying to the products or articles the wholesale list prices of the producer or manufacturer.

(b) If no such list prices are available, by applying to the products or articles the average prices at which sales are made during the taxable year to regular customers of the producer or manufacturer.

(c) If no such sales are made or if the proceeds from such sales are relatively small and their average prices

> inconclusive, by applying to the products or articles the *average market prices* for products or articles of like quality or character obtained by other producers and manufacturers. (Emphasis added)

Business and occupation tax Reg. BOT § 1.2.A.2.d.(1), effective on July 1, 1974, on the same subject dictates that:

> (1) The value of the natural resource product consumed or used shall be determined according to the *selling price at the place of use or consumption of similar products* of like quality and character *by other taxpayers*. (Emphasis added)

When these regulations are applied to the present situation, it becomes apparent that BOT 6.52.I.B.(2)(c) and Reg. BOT § 1.2.A.2.d.(1) give the proper valuation method for the taxpayer's coal produced in 1974. Under these methods, the taxpayer must value its coal with reference to the average selling price of similar coal sold by other producers. The value of $19.801 per ton as reported by Eastern and argued for by the taxpayer fails to comply with the proper valuation methods as outlined in the above-quoted regulations. The taxpayer's figure is arrived at by reference to a single other coal producer. This figure, although representative of Eastern's average sales price, may not be representative of the average price realized by similarly situated producers generally as is required by the regulations.

After reviewing the record in the present proceeding with reference to the business and occupation tax regulations governing valuation, it is determined that the value of $26.80 per ton for high volatile metallurgical grade coal is the proper production value to report for business and occupation tax purposes. This value represents the selling price per ton received by other taxpayers for similar coal. Therefore, the present assessment must be modified under the production classification for the year 1974 to reflect this determination.

It is also noted for the record that the production values originally reported for the taxpayer's coal for the years 1970, 1971, 1972, 1973 and 1975 and accepted by the State's tax

examiner during the present audit are not in conformance with the above determination. In fact, the values reported by the taxpayer for coal production in those years were substantially lower than the values which would have been reported under the proper valuation procedure. However, a higher value cannot be assigned to the taxpayer's production for other years in the audit period because the State in its audit has assigned values which were not disputed by the taxpayer. The taxpayer, however, must in all years succeeding the audit period report its coal production in conformance with the determination on this point.

It is also determined that the sales value of $26.80 per ton must be used by the taxpayer to compute its liability under the manufacturing classification in 1974 for 287,863 tons of coal purchased by it and then processed through its tipple in West Virginia. The determination is in conformance with the previous determination concerning the valuation of the taxpayer's own coal produced in West Virginia.

The second issue for determination is whether sales made by the taxpayer's Steel Group and Union Wire Rope Group to West Virginia customers are properly subject to the business and occupation tax.

It is determined that these sales are properly subject to the business and occupation tax, and are, therefore, properly included in the present assessment. The taxpayer was "engaging or continuing within this State in the business of selling any tangible property . . . ." as required by West Virginia Code § 11-13-2c during the audit period by the activity of its non-resident salesmen in West Virginia. The taxpayer, through the efforts of its salesmen in-state, systematically solicited orders for the wholesale purchase of its products by West Virginia customers. This activity satisfies the requirements of Code § 11-13-2c because without the work engaged in by the salesmen in West Virginia these sales would not have transpired.

Sufficient nexus to allow taxation of these transactions can also be found from the activity of the taxpayer's salesmen in West Virginia. These salesmen solicited orders in-state. In addition, they engaged in follow up activity which included the

taking of succeeding orders and follow up calls on customers to check on their satisfaction with the taxpayer's products. All of these activities were carried out in a systematic and repetitive manner within West Virginia, and they are crucial to the development and maintenance of a market for the taxpayer's products in this State.

In *General Motors Corp.* v. *Washington*, 377 U.S. 436 (1964), the Supreme Court held that district managers and service representatives acting in a supervisory or advisory capacity over sales promotion were sufficient to create nexus to sustain a gross receipts tax on all sales within the State. These representatives made no solicitation of the taxed sales yet their activities provided the basis for taxing those sales. In *Standard Pressed Steel Co.* v. *State of Washington*, 419 U.S. 560, 42 L.Ed. 2d 719 (1975), nexus sufficient for taxation was found in the presence of one employee operating out of his home whose duty was to consult with customers regarding anticipated needs and to assist with any difficulties developing in the use of the products. Further, *United States Tobacco Company* v. *Commonwealth of Pennsylvania*, 348 A. 2d 755 (1975) held pursuant to the standard in *Standard Pressed Steel* that the presence of a foreign corporation's "missionary" representatives in-state whose job was promoting goodwill and soliciting sales for the company made possible the realization and continuance of valuable contractual relationships and thereby established sufficient nexus for taxation. Therefore, in line with these cases, it is determined that the activities of the taxpayer's salesmen in-state make possible the realization and continuance of valuable contractual relationships, and, thereby establish sufficient nexus for the State to impose the business and occupation tax on these transactions.

It is also determined that the taxpayer has not shown that the imposition of the business and occupation tax on these transactions would discriminate against interstate commerce. It is not enough that the taxpayer generally alleges a risk of discrimination or of multiple burdens. Specific discrimination or multiple burdens must actually be proved. *See: Complete Auto Transit, Inc.* v. *Brady*, ____ U.S. ____, 97 S.Ct. 1076, 51 L.Ed. 2d 326 (1977).

The next issue for determination is whether the wholesale sales made by the metal buildings sub-group of the taxpayer's Metal Products Division to West Virginia dealers are properly subject to the business and occupation tax.

It is determined that these sales are properly taxable by the State of West Virginia. In the present situation, the taxpayer allows the dealers to whom it makes sales to display its corporate name and trademark at their place of business and in advertisements and shares advertising expenses with the dealer to promote dealer sales to ultimate consumers. In addition, the Armco Building Dealer Agreement calls for close cooperation between the dealer and the taxpayer to assume the "development and mutual growth of their individual businesses." From the foregoing, it is apparent that the taxpayer has satisfied the requirements for taxability under Code § 11-13-2c and has created nexus sufficient to constitutionally allow the imposition of the business and occupation tax by the State because these activities are designed to develop and hold a market for the taxpayer's product by insuring that the dealers to whom the taxpayer sells its product have a sufficient market in which to resell the buildings.

Finally, it is determined that the taxpayer has shown reasonable cause for total waiver of the remaining statutory penalty imposed in those years of the assessment with tax liabilities still outstanding because of its good faith effort to interpret a substantial question of law governing the proper reporting of its business and occupation tax liability.

WHEREFORE, it is the DECISION of David C. Hardesty, Jr., Tax Commissioner of the State of West Virginia, that the business and occupation tax assessment issued against Armco Steel Corporation for the period 1970 through 1975 is hereby modified in accordance with the above determinations to reflect a net refund due the taxpayer in the amount of $155,475.09.

/s/ DAVID C. HARDESTY, JR.
David C. Hardesty, Jr.
State Tax Commissioner

December 10, 1977
Date Rendered

Appendix D

FINAL ORDER ENTERED BY THE SUPREME COURT OF APPEALS REVERSING THE JUDGMENT OF THE CIRCUIT COURT

STATE OF WEST VIRGINIA

At a Regular Term of the Supreme Court of Appeals continued and held at Charleston, Kanawha County, on the 25th day of May, 1983, the following order was made and entered, to-wit:

ARMCO INC., an Ohio Corporation, Plaintiff Below,
Appellee,

—VS.—

DAVID C. HARDESTY, JR., State Tax Commissioner of West Virginia, Defendant Below,
Appellant.

Upon an appeal from a judgment of the Circuit Court of Kanawha County rendered on the 20th day of July, 1981.

The Court having maturely considered the transcript of the record herein, and the argument and briefs of counsel thereon, is of opinion for reasons stated in writing and filed with the record that there is error in said judgment. It is therefore considered and ordered by the Court that the judgment of the Circuit Court of Kanawha County rendered in this cause on the 20th day of July, 1981, be, and the same is hereby, set aside, reversed and annulled, and that the appellant do recover of and form [sic] the appellee his costs about the prosecution of his appeal in this Court in this behalf expended. AND this action is remanded to the Circuit Court of Kanawha County for disposition according to the principles stated in the written

opinion aforesaid and further according to law; all of which is ordered to be certified to the Circuit Court of Kanawha County.

The syllabus of points adjudicated, prefixed to the written opinion prepared by Justice Miller, was concurred in by Chief Justice McGraw and Justices Neely and Harshbarger. Justice McHugh, deeming himself disqualified, did not participate in the consideration or decision of this case.

A True Copy

Attest: /s/ GEORGE W. SINGLETON
Clerk Supreme Court of Appeals

Appendix E

NOTICE OF APPEAL

NO. 15437

IN THE
SUPREME COURT OF APPEALS
OF WEST VIRGINIA

ARMCO, INC., an Ohio corporation,
Plaintiff Below, Appellee,

—v.—

DAVID C. HARDESTY, JR.,
State Tax Commissioner of West Virginia,
Defendant Below, Appellant.

NOTICE OF APPEAL TO THE
SUPREME COURT OF THE UNITED STATES

Notice is hereby given that Armco Inc., the appellee above named, hereby appeals to the Supreme Court of the United States from the final order of the Supreme Court of Appeals of West Virginia, entered in this proceeding on May 25, 1983, setting aside and reversing the judgment of the Circuit Court of Kanawha County entered July 20, 1981, reversing the determination and assessment of the Tax Commissioner of West Virginia of Business and Occupation Tax claimed to be due and owing the State by Armco Inc.

A copy of this Notice will also be filed in the Circuit Court of Kanawha County, West Virginia, inasmuch as the record has been returned from this Court to the Circuit Court.

This appeal is taken pursuant to 28 U.S.C. § 1257(2).

/s/ G. THOMAS BATTLE

G. Thomas Battle
Spilman, Thomas, Battle & Klostermeyer
P. O. Box 273
Charleston, WV 25321
Phone: (304) 344-4081
Counsel for Appellee

AFFIDAVIT OF SERVICE

STATE OF WEST VIRGINIA,

COUNTY OF KANAWHA, TO-WIT:

I hereby affirm and certify that service of the foregoing Notice of Appeal to the Supreme Court of the United States was made on the only party required to be served by mailing a true copy thereof to Appellant's attorney, Robert Digges, Jr., Assistant Attorney General, addressed to him at the Attorney General's Office, State Capitol, Charleston, West Virginia 25305, in the regular United States mail, postage prepaid, this 19th day of August, 1983.

/s/ G. THOMAS BATTLE

G. Thomas Battle
P. O. Box 273
Charleston, WV 25321
Phone: (304) 344-4081
Counsel for Appellee

Taken, subscribed and sworn to before me, a Notary Public in said county and state, this 19th day of August, 1983.
My commission expires August 13, 1984.

/s/ LINDA J. ROSS

Notary Public, Kanawha County, WV

Commissioned as Linda J. Mayville

Appendix F

DESIGNATION OF CORPORATE RELATIONSHIPS

Armco Inc., filing this Jurisdictional Statement as Appellant in this proceeding, states that:

This is its original Designation of Corporate Relationships.

Armco Inc. is not owned by any parent corporation.

Armco Inc. has an ownership interest in the following subsidiaries:

Accerex
Aceros Del Sur S.A.
Allied Investment Corporation
The American Life Insurance Company of New York
Armco-Bundy Ror AB
Armco Industrial S.A.
Armco Industries (Nigeria) Ltd.
Armco Jennings Finance Limited
Armco Marsteel Alloy Corporation
Armco Moly-Cop S.p.A.
Armco Peruana S.A.
Armco Robson (Pty.) Limited
Armco Thyssen GmbH
Australian Steel & Mining Corporation Pty. Ltd.
P. T. Bakrie—Armco
Bienes de Capital Imsa, S.A. de C.V.
Big Three Lincoln (U.K.) Limited
Black River Lime Company
Bundy Venezolana C.A.
Carryore, Limited
Chatillon-Armco S.A.
Court Galvanizing, Inc.
Court Galvanizing Limited
D.T.F.S.I.C.A.
Equipetrol Administracao E Participacoes Ltd.

Equipetrol, S.A.
Equipetrol Norte Industria E Commercio Ltd.
Falconbridge Dominicana C. por A.
Herman Smith HITCO Ltd.
IMSA National, S.A. de C.V.
Industrias National Supply C.A.
Iron Ore Company of Canada
Mansion Management Services Limited
Marine Mineral Industries, Inc.
Metaltubos C.A.
Middletown Enterprises, Inc.
Minera Cerro de Plata, S.A. de C.V.
Northern Land Company
Nuovi Tubi Brindisi SpA
Obras Civiles e Industrias C.A.
Oregon Metallurgical Corporation
Productos Metalicos Armco S.A.
Prolansa
Reserve Mining Company
Wilbur Smith and Associates Limited
State Surety Company
Technocargo-Transportes Especializados Ltd.
Torcad Limited

Armco Inc. does not have an ownership interest in any other subsidiaries (excepting only wholly owned subsidiaries).

Armco Inc. does not have any affiliates.

Dated: August 23, 1983

Appendix G

CONSTITUTIONAL AND STATUTORY PROVISIONS

United States Constitution, Article I, Section 8, Clause 3 (the "Commerce Clause"):

> The Congress shall have power . . . To regulate commerce with foreign nations, and among the several states, and with Indian tribes.

United States Constitution, Fourteenth Amendment (the "Due Process Clause"):

> [N]or shall any state deprive any person of life, liberty, or property, without due process of law . . . .

West Virginia Code:

> § 11-13-1. Definitions.
>
> * * *
>
> "Sale," "sales" or "selling" includes any transfer of the ownership of or title to property, whether for money or in exchange for other property.
>
> * * *
>
> "Gross income" means the gross receipts of the taxpayer, other than a banking or financial business, received as compensation for personal services and the gross receipts of the taxpayer derived from trade, business, commerce or sales and the value proceeding or accruing from the sale of tangible property (real or personal), or service, or both, and all receipts by reason of the investment of the capital of the business engaged in, including rentals, royalties, fees, reimbursed costs or expenses or other emoluments however designated and including all interest, carrying charges, fees or other like income, however denominated, derived by the taxpayer from repetitive carrying of accounts, in the regular course and conduct of

his business, and extension of credit in connection with the sale of any tangible personal property or service, and without any deductions on account of the cost of property sold, the cost of materials used, labor costs, taxes, royalties paid in cash or in kind or otherwise, interest or discount paid or any other expenses whatsoever. "Gross income" of a banking or financial business is specified in section two-k [§ 11-13-2k] of this article.

"Gross proceeds of sales" means the value, whether in money or other property, actually proceeding from the sale of tangible property without any deduction on account of the cost of property sold or expenses of any kind.

* * *

"Selling at wholesale" or "wholesale sales" shall mean and include: (1) Sales of any tangible personal property for the purpose of resale in the form of tangible personal property; (2) sales of machinery, supplies or materials which are to be directly consumed or used by the purchaser in the conduct of any business or activity which is subject to the tax imposed by this article or by article twelve-A [§ 11-12A-1 et seq.] of this chapter; and (3) sales of any tangible personal property to the United States of America, its agencies and instrumentalities or to the State of West Virginia, its institutions or political subdivisions.

§ 11-13-2. Imposition of privilege tax.

There is hereby levied and shall be collected annual privilege taxes against the persons, on account of the business and other activities, and in the amounts to be determined by the application of rates against values or gross income as set forth in sections two-a to two-k [§§ 11-13-2a to 11-13-2k], inclusive, of this article.

If any person liable for any tax under section two-a or two-b [§ 11-13-2a or 11-13-2b] shall ship or transport his products or any part thereof out of the State without making sale of such products, the value of the products in the condition or form in which they exist immediately

before transportation out of the State shall be the basis for the assessment of the tax imposed in said sections, except in those instances in which another measure of the tax is expressly provided. The tax commissioner shall prescribe equitable and uniform rules for ascertaining such value.

In determining value, however, as regards sales from one to another of affiliated companies or persons, or under other circumstances where the relation between the buyer and seller is such that the gross proceeds from the sale are not indicative of the true value of the subject matter of the sale, the tax commissioner shall prescribe uniform and equitable rules for determining the value upon which such privilege tax shall be levied, corresponding as nearly as possible to the gross proceeds from the sale of similar products of like quality or character where no common interest exists between the buyer and seller but the circumstances and conditions are otherwise similar.

Gross income included in the measure of the tax under sections two-a and two-b [§§ 11-13-2a or 11-13-2b] of this article shall neither be added nor deducted in computing the tax levied under the other sections of this article.

A person exercising any privilege taxable under sections two-a or two-b [§ 11-13-2a or 11-13-2b] of this article and engaging in the business of selling his natural resources or manufactured products at retail in this State shall be required to make returns of the gross proceeds of such retail sales and pay the tax imposed in section two-c [§ 11-13-2c] of this article for the privilege of engaging in the business of selling such natural resources or manufactured products at retail in this State. But any person exercising any privilege taxable under sections two-a or two-b [§ 11-13-2a or 11-13-2b] of this article and engaging in the business of selling his natural resources or manufactured products to producers of natural resources, manufacturers, wholesalers, jobbers, retailers or commercial consumers for use or consumption in the purchaser's

business shall not be required to pay the tax imposed in section two-c [§ 11-13-2c] of this article.

Manufacturers exercising any privilege taxable under section two-b [§ 11-13-2b] of this article shall not be required to pay the tax imposed in section two-c [§ 11-13-2c] of this article for the privilege of selling their manufactured products for delivery outside of this State, but the gross income derived from the sale of such manufactured products outside of this State shall be included in determining the measure of the tax imposed on such manufacturer in section two-b [§ 11-13-2b].

A person exercising privileges taxable under the other sections of this article, producing coal, oil, natural gas, minerals, timber or other natural resource products the production of which is taxable under section two-a [§ 11-13-2a], and using or consuming the same in his business or transferring or delivering the same as any royalty payment, in kind, or the like, shall be deemed to be engaged in the business of mining and producing coal, oil, natural gas, minerals, timber or other natural resource products for sale, profit or commercial use, and shall be required to make returns on account of the production of the business showing the gross proceeds or equivalent in accordance with uniform and equitable rules for determining the value upon which such privilege tax shall be levied, corresponding as nearly as possible to the gross proceeds from the sale of similar products of like quality or character by other taxpayers, which rules the tax commissioner shall prescribe. (1921, c. 110, § 2; Code 1923, c. 31A; § 2; 1925, Ex. Sess., c. 1, §§ 2-2h; 1933; Ex. Sess., c. 33; 1935, c. 86; 1955, c. 165; 1971, c. 169.)

§ 11-13-2a. Severance, extraction and production of coal and other natural resource products.

Upon every person exercising the privilege of engaging or continuing within this State in the business of severing, extracting, reducing to possession and producing for sale, profit or commercial use any natural resource products,

the amount of such tax to be equal to the value of the articles produced as shown by the gross proceeds derived from the sale thereof by the producer, except as otherwise provided, multiplied by the respective rates as follows: Coal, three and five-tenths percent; limestone or sandstone, quarried or mined, two and two-tenths percent; oil, four and thirty-four one hundredths percent; natural gas, in excess of the value of five thousand dollars, eight and sixty-three one hundredths percent; blast furnace slag, four and thirty-four one hundredths percent; sand, gravel or other mineral product not quarried or mined, four and thirty-four one hundredths percent; timber, two and two-tenths percent; other natural resource products, two and eighty-six one hundredths percent. The measure of this tax is the value of the entire production in this State, regardless of the place of sale or the fact that the delivery may be made to points outside the State: Provided, however, that for the purposes of the production of oil classification, and the production of natural gas classification, as set forth in this section, multiple co-owners of oil or natural gas, in place, lessees thereof, or others being vested with title and ownership to part or all of the oil and gas, as personal property, immediately after severance, extraction, reduction to possession and production, except royalty recipients, in kind, shall be deemed to be a "group or combination acting as a unit" and one "person," as defined in section one [§ 11-13-1] of this article, if not otherwise defined therein, whenever engaged in the business of producing oil or natural gas through common use, by joint or separately executed contracts, of the same independent contractor driller or operator's services; and notwithstanding provisions of private contracts for separate deposit of gross receipts in separate members' accounts or for members of such group or combination to take in kind any proportionate part of such natural resources.

Lessees, sublessees or other denominated lessees are considered to be producers of all of the oil or natural gas

produced, regardless of any payment, in kind, to lessors, sublessors or other denominated lessors of a part of such natural resources as rents or royalties. Recipients of royalties or rents, in kind, in cash or otherwise are taxable on their gross income pursuant to the provisions of section two-i [§ 11-13-2i] of this article. (1935, c. 86; 1955, c. 165; 1959, c. 167; 1971, c. 169.)

§ 11-13-2b. Manufacturing, compounding or preparing products; processing of food excepted.

Upon every person engaging or continuing within this State in the business of manufacturing, compounding or preparing for sale, profit, or commercial use, either directly or through the activity of others in whole or part, any article or articles, substance or substances, commodity or commodities, or electric power produced by public utilities or others and not taxed under other provisions of this article, or newspaper publishing (including all gross income or proceeds of sale from circulation and advertising), the amount of the tax to be equal to the value of the article, substance, commodity or electric power or newspaper, manufactured, compounded or prepared for sale, as shown by the gross proceeds derived from the sale thereof by the manufacturer or person compounding or preparing the same, except as otherwise provided, multiplied by a rate of eighty-eight one hundredths of one percent. The measure of this tax is the value of the entire product manufactured, compounded or prepared in this State for sale, profit or commercial use, regardless of the place of sale or the fact that deliveries may be made to points outside the State. However, the dressing and processing of food by a person, firm or corporation, which food is to be sold on a wholesale basis by such person, firm or corporation shall not be considered as manufacturing or compounding, but the sale of these products on a wholesale basis shall be subject to the same tax as is imposed on the business of selling at wholesale as provided in section two-c [§ 11-13-2c].

It is further provided, however, that in those instances in which the same person partially manufactures, compounds or prepares products within this State and partially manufactures, compounds or prepares such products outside of this State the measure of his tax under this section shall be that proportion of the sale price of the product that the payroll cost of manufacturing within this State bears to the entire payroll cost of manufacturing the product; or, at the option of the taxpayer, the measure of his tax under this section shall be the proportion of the sales value of the articles that the cost of operations in West Virginia bears to the full cost of manufacture of the articles. (1935, c. 86; 1951, c. 179; 1955, c. 165; 1959, c. 167; 1967, c. 188; 1971, c. 169; 1974, c. 133.)

§ 11-13-2c. Business of selling tangible property; sales exempt.

Upon every person engaging or continuing within this State in the business of selling any tangible property whatsoever, real or personal, including the sale of food, and the services incident to the sale of food in hotels, restaurants, cafeterias, confectioneries, and other public eating houses, except sales by any person engaging or continuing in the business of horticulture, agriculture or grazing, or of selling stocks, bonds or other evidences of indebtedness, there is likewise hereby levied, and shall be collected, a tax equivalent to fifty-five one hundredths of one percent of the gross income of the business, except that in the business of selling at wholesale the tax shall be equal to twenty-seven one hundredths of one percent of the gross income of the business. (1935, c. 86; 1937, c. 105; 1955, c. 165; 1959, c. 167; 1971, c. 169.)

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No. 83-297

IN THE

Supreme Court of the United States

OCTOBER TERM, 1983

ARMCO INC.,

Appellant,

v.

DAVID C. HARDESTY, JR.,
State Tax Commissioner of West Virgina,

Appellee.

ON APPEAL FROM THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

JOINT APPENDIX

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Appeal Docketed August 23, 1983
Probable Jurisdiction Noted December 12, 1983

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CHRONOLOGICAL LIST OF RELEVANT DOCKET ENTRIES

January 12, 1978	Order of Circuit Court of Kanawha County granting permission to file Notice of Appeal from Administrative Decision of State Tax Commissioner; Notice of Appeal filed.
March 22, 1978	Order of Circuit Court of Kanawha County granting permission to file Answer to Notice of Appeal; Answer filed.
December 30, 1980	Memorandum of Opinion filed by Circuit Court of Kanawha County [text printed in Appendix B to Jurisdictional Statement at 25a].
July 20, 1981	Order and Judgment of Circuit Court of Kanawha County reversing Administrative Decision of State Tax Commissioner [text printed in Appendix B to Jurisdictional Statement at 33a].
November 4, 1981	Petition for Appeal to Supreme Court of Appeals of West Virginia and Petitioner's Designation of Record filed.
December 17, 1981	Order of Supreme Court of Appeals of West Virginia granting appeal.
May 25, 1983	Opinion and Final Order of Supreme Court of Appeals of West Virginia reversing and remanding Circuit Court judgment [text of Opinion printed in Appendix A to Jurisdictional Statement at 1a; text of Final Order printed in Appendix D to Jurisdictional Statement at 51a].

August 19, 1983	Notice of Appeal to Supreme Court of the United States filed in Supreme Court of Appeals of West Virginia [text printed in Appendix E to Jurisdictional Statement at 53a].
September 8, 1983	Order and Judgment of Circuit Court of Kanawha County vacating Circuit Court Order and Judgment of July 20, 1981 and affirming Administrative Decision of State Tax Commissioner.

PARTIAL TRANSCRIPT OF PROCEEDINGS BEFORE THE STATE TAX DEPARTMENT OF WEST VIRGINIA

STATE TAX DEPARTMENT

DOCKET NO. 77-105B

ARMCO STEEL CORPORATION

Petition for Reassessment
Business and Occupation Tax
File No. 31 020 0500 004

Transcript of proceedings had or testimony adduced in the above-styled case in the Office of Hearings and Appeals, 1217 Quarrier Street, Charleston, West Virginia, on Monday, May 23, 1977, at 10:00 o'clock a.m., pursuant to notice duly given by authority of the Tax Commissioner.

BEFORE:

FRANK SKINNER, Hearing Examiner

APPEARANCES:

G. THOMAS BATTLE, Attorney at Law
MICHAEL WINK, Attorney at Law
JAMES D. RYAN, Attorney at Law
CLAYTON CONDRY, Engineer
CARL OBEMEIER, Controller
FRANK DEITSCH, Controller
WILLIAM MARTIN, Purchasing Department
EUGENE J. DABKOWSKI, Senior Tax Administrator
E.D. CONAWAY, Chief Engineer-Robinson & Robinson Division NUS Corporation
HERBERT M. GEARY, District Sales Manager
ROBERT E. WEIFORD, Metal Product Division

STAFF:

MICHAEL STAJDUHAR, Tax Analyst
R. MICHAEL REED, Tax Analyst
WILLIAM C. MILLER, II, Tax Analyst
RUSSELL MILLER, Auditing Department
H. IRVIN HOFFMAN, State Auditing Department

[2]

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[3] EXAMINER SKINNER: There comes on for hearing a Business and Occupation Tax Assessment issued by Richard L. Dailey, former Tax Commissioner of the State of West Virginia, against Armco Steel Corporation. That Taxpayer has filed a timely Petition for Reassessment, due notice has been given of this hearing and the same is properly convened.

Armco Steel Corporation is represented by G. Thomas Battle, Attorney at Law of Charleston, West Virginia; Michael Wink, Attorney at Law, Charleston, West Virginia; James D. Ryan, Attorney for Armco; Eugene J. Dabkowski, Senior Tax Administrator of Armco; Carl Obemeier, Controller Armco; Frank Deitsch, Controller Armco; Clayton Condry, Armco Engineer; William Martin, Armco Purchasing Department; Herbert Wm. Geary, District Sales Manager; Robert E. Weiford, Metal Products Division.

The Tax Department is represented by Michael Stajduhar, Tax Analyst; R. Michael Reed, Tax Analyst; William C. Miller, II, Tax Analyst; Russell Miller, Auditing Department and by H. Irvin Hoffman, also of Auditing.

[4] This hearing comes on before Frank Skinner, Hearing Examiner, at 10:00 o'clock a.m. EDT on the 23rd day of May, 1977.

Before we proceed are there any preliminary matters or motions to be made by either party?

MR. REED: The State has none.

MR. BATTLE: None at this time.

EXAMINER SKINNER: Very well, Mr. Reed, if you would proceed with the State's case.

MR. REED: Thank you, Mr. Examiner. Pursuant to a field audit conducted by Mr. H. Irvin Hoffman, a Tax Examiner with the Auditing Section of the Business Tax Division, a Business and Occupation Tax Assessment was issued on January 6, 1977 by Richard L. Dailey, the then Tax Commissioner of the State of West Virginia, against Armco Steel Corporation of 703 Curtis Street, Middletown, Ohio 45043. The Assessment was issued according to the provisions of Section 7, Article 13, Chapter 11 of the Code of West Virginia 1931 as amended. The Assessment was for the period of January 1, 1970 through

December 31, 1975 for tax of $480,028.36 plus penalty of $237,942.54 for a [5] total assessed liability of $717,970.90. The Taxpayers' agent was served with notice of this assessment by certified mail on January 10, 1977.

Mr. Examiner, at this time the State would like to have marked collectively as State's Exhibit No. 1 and received into evidence as such a carbon copy of the assessment together with the original Return Receipt Card and a carbon copy of the cover letter. The State requests leave to withdraw these and to substitute photocopies therefore [sic]. The State is furnishing Mr. Battle with same.

EXAMINER SKINNER: Very well. The carbon copy of the original assessment in this matter, carbon copy of cover letter and original return receipt card will be marked as State's Exhibit No. 1 and admitted into evidence as such.

(WHEREUPON, the documents referred to were marked State's Exhibit No. 1 for purposes of identification and received in evidence.)

[6] MR. REED: Mr. Examiner, at this time the State would like to have marked for identification as State's Exhibit No. 2 and received into evidence as such an original of an agreement consenting to an extension of the statute of limitations, dated January 7, 1976 by and between Richard L. Dailey, the then Tax Commissioner of the State of West Virginia and the Taxpayer Petitioner, Armco Steel Corporation. This agreement constitutes a one year extension of the five year statute of limitations for collecting Business and Occupation Tax and Consumer Sales and Service Tax for the year 1970, pursuant to Section 19 of Article 2 of Chapter 55 of the Code. The Statute of limitations itself is also provided by that section. It should be noted that this extension agreement is signed by Frederick C. Van Scoyoc, identified as Assistant Controller and Director of Taxes of and for Armco Steel Corporation.

The State requests leave again to withdraw this original and substitute a photocopy therefore [sic], and the State is furnishing Mr. Battle with a photocopy of the same.

[7] EXAMINER SKINNER: The agreement extending the statute of limitation period dated January 7, 1976 between the Taxpayer and the State Tax Department will be marked as State's Exhibit No. 2 and admitted into evidence as such with leave granted to withdraw the original and substitute a photocopy therefore [sic].

(WHEREUPON, the document referred to was marked State's Exhibit No. 2 for purposes of identification and received in evidence.)

MR. REED: At this time, the State would like to have marked for identification collectively as State's Exhibit No. 3 and received into evidence as such the original Audit Working Papers as compiled by the Auditing Section of the Business Tax Division, and the State requests leave to withdraw the original and substitute a photocopy therefore [sic]. Again, the State is furnishing Mr. Battle with a photocopy of same. I believe, Mr. Battle has been furnished with a photocopy of the same prior to this hearing.

[8] EXAMINER SKINNER: Very well. The Audit Work Papers prepared in this matter by the Auditing Section of the Business Tax Division will be marked as State's Exhibit No. 3 and introduced into evidence as such with leave granted to substitute a photocopy for the original.

MR. BATTLE: May I ask just a moment, to have, to make sure this is—

EXAMINER SKINNER: Certainly. Off the record for a second.

(WHEREUPON, discussion was had off the record.)

(WHEREUPON, the documents referred to were marked State's Exhibit No. 3 for purposes of identification and received in evidence.)

EXAMINER SKINNER: On the record. Mr. Reed, you may continue.

MR. REED: Thank you, Mr. Examiner. At this time the State would like to have marked for identification collectively as State's Exhibit No. 4 and received into [9] evidence as such the

original Annual Business and Occupation Tax Returns filed by the Taxpayer for each of the years in the assessment period, namely, calendar years 1970 through 1975. Each of these returns are signed by Mr. Van Scoyoc, Assistant Controller of the Taxpayer. Again, the State requests leave to withdraw these originals and substitute photocopies therefore [sic]. The State is furnishing Mr. Battle with photocopies of the same.

EXAMINER SKINNER: Mr. Battle, would you care to view these originals before they are admitted?

MR. BATTLE: I'll look at the copies.

EXAMINER SKINNER: Off the record.

(WHEREUPON, discussion was had off the record.)

EXAMINER SKINNER: On the record. Do the returns seem to be in order, Mr. Battle?

MR. BATTLE: Yes. They appear to be copies.

EXAMINER SKINNER: Very well, the original Business and Occupation Tax Returns of the Taxpayer for the audit period will be marked as State's Exhibit No. 4 and received as such and leave will be granted to substitute [10] photocopies for the originals.

(WHEREUPON, the document referred to was marked State's Exhibit No. 4 for purposes of identification and received in evidence.)

EXAMINER SKINNER: Mr. Reed.

MR. REED: The envelope containing the Taxpayer's Petition for Reassessment was postmarked February 7, 1977. As stated previously, the certified return receipt card for the notice of assessment indicates Taxpayer's agent received the notice of assessment on January 10, 1977 and therefore the Taxpayer's Petition for Reassessment was timely filed within 30 days after receipt of the notice of assessment pursuant to Code Chapter 11, Article 13, Section 7B.

Mr. Examiner, at this time the State would like to have marked for identification as State's Exhibit No. 5 and received into evidence as such a photocopy of the Taxpayer's timely filed Petition for Reassessment. The State, again, requests

leave to withdraw this **[11]** photocopy and substitute another photocopy therefore [sic]. The State is furnishing Mr. Battle with photocopy of same.

EXAMINER SKINNER: Very well, a photocopy of the Taxpayer's Petition for Reassessment in this matter will be marked as State's Exhibit No. 5 and admitted into evidence as such and leave will be granted to substitute another photocopy.

> (WHEREUPON, the documents referred to were marked State's Exhibit No. 5 for purposes of identification and received in evidence.)

MR. REED: It should be noted that the Taxpayer, in its petition, contested the following portions of the assessment for the following reasons. The assessment fails to substitute an accurate value for coal produced in the year 1974 for the erroneous value reported by Petitioner on its return for that year. The assessment erroneously includes certain sales in interstate commerce not properly taxable, apparently due to lack of sufficient nexus with the State. There are other alleged errors listed as alleged errors, Numbers 1, 3 and 6 in the **[12]** Petition. Petitioner submits that reasonable cause exists for waiver of the penalty on the grounds that:

> "It has consistently filed timely Business and Occupation Tax Returns with the State of of [sic] West Virginia, reporting its tax based upon a fair and reasonable analysis of the law and available regulations and consistent with prior audit examinations conducted by representatives of the State Tax Commissioner."

The Taxpayer, Petitioner, Armco Steel Corporation was created under the laws of the State of Ohio on or about June 29, 1917 and was qualified to transact business and hold property within this state on October 8, 1938. During the assessment period, the Taxpayer had several divisions with activities within the State of West Virginia. The State would like to attempt a summary at this time of those type of activities.

First, the Steel Division, Coal Operations. The Taxpayer severes [sic] and prepares coal within West Virginia that is shipped to the Taxpayer's out-of-state steel manufacturing plants and uses or consumes the coal therein. The Taxpayer also severes [sic] and prepares coal within this state that is used or consumed in the Taxpayers tipples or coal preparation plants within this state and **[13]** heat drying preparation of other coal.

The Taxpayer also purchases some coal and prepares it within this State for use in manufacturing steel at its out-of-state locations or in West Virginia tipples in preparing other coal. The Taxpayer makes a few retail sales of coal to local residents, to local board of educations and to employees, and makes a few retail sales of safety equipment from its coal supply houses. The Taxpayer's coal operations also make a few wholesale sales of scrap.

Now, as to the Steel Divisions, non-coal operations, Taxpayer's Steel Division makes wholesale sales of sheet steel and through its Union Wire Rope subdivision of Wire Rope, resells Wire Rope through that subdivision.

The Taxpayer's Metal Products Division makes wholesale sales of corregated [sic] pipe, guard rails and prefabricated buildings and at times installs pipe and metal buildings as well as making a few retail sales of pipe.

The Taxpayer's National Supply Corporation **[14]** Division sells oil field supplies, such as tubular stocks, items used in pumping, etc. Most sales are at wholesale, but some are at retail.

Finally, the Construction Products Division makes a few sales, and most, if not all, are wholesale sales.

Mr. Examiner, it is the State's position that the tax and penalty are due as assessed because, first, as to coal production in the years 1970, 1971, 1972, 1973 and 1975 the Taxpayer understated the production value of coal produced within this state and shipped to its steel manufacturing plants located outside the State of West Virginia. Also, in each of the years in the audit period, 1970 through 1975 the Taxpayer totally failed to report the production value of coal consumed or used in

heat drying of other coal at the Taxpayer's coal preparation plants or tipples located within this state. In the year 1974 Taxpayer failed to report total coal production tons shipped to its out-of-state plants.

As to manufacturing in each year in the assessment period other than the year 1975, that is, in **[15]** the years 1970 through 1974 the Taxpayer totally failed to report the manufacturing value of coal purchased and prepared at its West Virginia preparation plants.

As to wholesale sales in each of the years in the assessment period, that is, the years 1970 through 1975, the Taxpayer totally failed to report the following wholesale sales to West Virginia customers by its divisions having sufficient nexus with the state. One, sales of scrap materials by Steel Divisions of coal operations. Second, sales of dealer sales aids by its Metal Products Division.

As to penalty the Taxpayer's petition fails to state reasonable cause for waiver of the penalty, especially penalty attributed to unreported production value of coal used to prepare other coal, and especially as to unreported manufacturing value of coal purchased and then prepared by the Taxpayer. The penalty in question attached automatically by statute, was not imposed after the fact by the Tax Commissioner. The penalty is a non-fraud civil deficiency or delinquency penalty. There are separate statutory civil fraud penalties **[16]** and criminal penalties and neither of these were imposed; therefore, the State submits that good faith, unintentional oversight, ignorance of the law or the like, do not constitute reasonable cause for waiver of the penalty. Once the penalty has automatically attached the Tax Commissioner, according to the statute, may, and the wording of the statute is may, not shall, waive all or any part of the penalty for reasonable cause both stated and proven by the Taxpayer.

Mr. Examiner, the State has nothing further at this time.

EXAMINER SKINNER: Very well then, Mr. Battle, if you would care to proceed with the Taxpayer's case.

MR. BATTLE: Mr. Examiner, as indicated by Mr. Reed, the assessment pending against Armco Steel Corporation can be

broken down into two, perhaps, three general categories. Under the general heading of Coal or Coal Division of Armco, there is the issue of the value of the coal produced by Armco and shipped to its plants, steel plants, outside of West Virginia, the value of the coal produced and consumed in its processing and preparation [17] plants, the value of coal purchased and processed. Then, in the area of sales of completed products into West Virginia there is the question of whether the sales in issue, are properly taxable by the State of West Virginia under the Business and Occupation Tax law.

First, with respect to the value of coal produced by Armco at its coal mining operations in West Virginia, Armco takes no exception to the adjustment in value made for the years 1970, 1971, 1972, 1973 and 1975. Armco believes that the Auditor and the State Tax Commissioner, in his assessment, has used for those years the best measure of the value of that coal, which is the price of coal of equal or better quality which was sold by another company operating mines in the vicinity of the Armco Steel Company operations.

For the year 1974, we believe that the value as reported by Armco was reported in error and is excessive and that the same source should be utilized for determining the market value of coal produced in that year that was used for the other years during the audit period. We believe this requirement is clear under the statute and [18] the regulations.

With respect to consumed coal, that is coal that was produced by Armco and utilized in its coal preparation operations and to some extent, in its boilers, we do not contest the concept that that coal was produced and is properly subject to the Business and Occupation Tax. We do take exception to the value assigned to that coal for the year 1974 and are willing to recognize the State's value as determined from the same source as the—that I mentioned before as far as the value for other years, other than 1974.

The coal that was purchased and manufactured and processed by Armco through its coal preparation plant in West Virginia is recognized as properly taxable under the manufacturing classification. Our exception, again, is taken to the

value assigned for the other years during the audit recognized as being valid and we take no exception to those.

Now, with respect to sales of products, finished products, by Armco Steel Corporation to West Virginia, we believe that there are substantial questions **[19]** whether the transactions involved constitute sales as that term is defined under the Business and Occupation Tax law and consequently, whether the activity in question is subject to the Business and Occupation Tax at all. In addition, we believe that there is insufficient activity in West Virginia to justify the State assessing and collecting Business and Occupation Tax on sales of the Steel Division and on sales of the metal buildings of the Metal Products Division.

With respect to the penalty that Mr. Reed referred to, we believe that the penalty should not be invoked against Armco Steel Corporation in this case. The majority of the liability in this assessment deals with—relates to coal value and the value of coal. Up until 1974 Armco reported its coal value on the basis, approximating the basis, that was arrived at as a result of prior examinations of its company by the State of West Virginia. With respect to the year 1974, we believe that the Business and Occupation Tax is substantially over paid and that overpayment should be recognized and a realistic value assigned, realistic and accurate value **[20]** assigned, to the coal produced by Armco for that year.

With respect to destination sales, or so-called interstate sales, the Metal Products Division sales were largely reported under the retail classification in error and under the audit were reclassified to wholesale. The Steel Division sales were not reported, being treated as interstate sales and not subject to the Business and Occupation Tax, which we believe was a valid and proper position under the Business and Occupation Tax law and the case law, as it exists.

We would like to proceed this morning, Mr. Examiner, with, initially, with evidence regarding the coal issues and thereafter, when that is completed, deal with the issues relating to the sales.

EXAMINER SKINNER: Very well.

[Portion of Transcript concerning the coal issues (pp. 20-165) omitted in printing.]

[165] EXAMINER SKINNER: Mr. Battle.

MR. BATTLE: Mr. Examiner, that's all the questions I have on the coal issue. I'd like to move along now to the issue relating to sales, if I might.

[166] EXAMINER SKINNER: Certainly.

MR. BATTLE: I'd like to ask Mr. Geary.

(Witness sworn.)

THEREUPON came, HERBERT M. GEARY called as a witness on behalf of the Petitioner, who, having been first duly sworn according to law, testified as follows:

Direct Examination By Mr. Battle:

Q Would you, please, state your name, age and place of residence?

A My name is Herbert M. Geary, 54 years of age. I reside in Cincinnati, Ohio.

Q Mr. Geary, by whom are you employed and for how long have you been so employed?

A I'm employed by Armco Steel Corporation, and I will have 30 years in October 2nd, of this year.

Q What is your position with Armco Steel, at the present time and perhaps I should, you should state the position you held during the period of '70 through '75, **[167]** if you will?

A I was District Manager in our Atlanta District Office, in 1970 and July 14, of '72, I became District Manager of our Cincinnati District Sales Office and responsible for the sale of Steel Division Products in that district.

Q The pending assessment against Armco Steel Corporation, Mr. Geary, in addition to reclassifying certain sales by Metal Products Division from retail to wholesale which I mentioned earlier and making certain mathematical corrections, included as taxable sales shipments into West Virginia by the Steel Division and by the Union Wire Rope Division. I

wonder if you would describe, briefly, the products that are sold by those divisions and the nature of the sales organization and the Metal Products Division also?

A Those are three distinct and separate divisions and are individually responsible for the sales of the products produced by those divisions. The steel group, there are nine steel plants in seven states produce practically all steel mill products with emphasis on high **[168]** quality steels for specific needs.

Union Wire Rope, with a mill in Kansas City and warehouses in Ashland, Kentucky and Pittsburgh, Pennsylvania, produce wire rope slings and assessories [sic].

The Metal Products Division produces a variety of construction products, corregated [sic] metal pipe, retaining wall, guard rail, plastic sewer pipe, flood gates, buildings and so forth.

Q You mentioned that the steel group had nine steel plants, steel manufacturing plants. Are any of those plants located in West Virginia?

A No.

Q With regard to the Steel Division and the Union Wire Rope Division, let me say here for the record, that we have a following witness representing the Metal Products Division, so I'll rely on his testimony for the Metal Products Division. With respect to the other two, the steel group and the Union Wire Rope, do either of those have any sales offices located in West Virginia?

A No.

Q Do they have any sales or service employees **[169]** that reside in West Virginia?

A None.

Q Do either of those have any inventory that they maintain in West Virginia?

A None.

Q How are orders for goods that are shipped into West Virginia to customers of the Steel Division, Union Wire Rope, how are those orders obtained?

A They are obtained by telephone or personal solicitation, solicitation at purchasing headquarters located outside West Virginia. At this point it might be of interest and I'd like to

mention the fact that the Cincinnati Office in 1976 shipped 7.5 percent of our tons and 8 percent of our dollars into West Virginia, a small amount compared to the other states that we cover. It might be of interest also, to mention that three accounts, namely American Car and Foundry, a Chessie System and American Motors accounted for 77 percent of those tons and orders are solicited in St. Louis, Baltimore and Milwaukee for those accounts American Car and Foundry, Chessie Corporation and American Motors. American Car and **[170]** Foundry is solicited at St. Charles, Missouri out of our St. Louis District Office, American Motors is solicited in Milwaukee and Chessie is solicited by our Baltimore.

Q So that, take American Car and Foundry for example, your St. Louis office would call on the American Car and Foundry Headquarters there for the sale of steel that would be consumed and used by their plant that is located in Huntington, West Virginia?

A Right. We are called on, occasionally, to investigate complaints or strictly service work there.

Q Mr. Geary, I'd like to show you now a form and ask if you would identify that for me, please?

A This is a form on which we make quotations to our customers.

Q Does that form—excuse me.

MR. BATTLE: I'd like to submit this form as Petitioner's Exhibit No. 5. I'll present Mr. Reed a copy.

EXAMINER SKINNER: Very well, Armco's quotation form, as just described by the Taxpayer's Counsel, will be marked as Petitioner's Exhibit No. 5 and admitted into evidence as such.

> **[171]** (WHEREUPON, the document referred to was marked Petitioner's Exhibit No. 5 for purposes of identification and received in evidence.)

By Mr. Battle:

Q You said, I believe, Mr. Geary, you used this form to submit quotations to customers of the Steel Division?

A Right.

Q Does this contain also the conditions upon which the sales would be made?

A Yes, on the reverse side of this form.

Q Are those conditions called to the attention of the customer at the time that you or one of your salesmen is making initial contact with the customer?

A Of course, it's spelled out very clearly in the quotation itself and it's discussed from time to time in the solicitation of the steel business.

Q Let me also hand you now another form and ask if you will identify that?

[172] A This is an order acknowledgement form. It's actually an acknowledgement form for the customer and on the reverse side are also the conditions of sale.

MR. BATTLE: I'd like to submit that, Mr. Examiner, as Petitioner's Exhibit No. 6.

EXAMINER SKINNER: Armco Steel Corporation Order Acknowledgement form will be marked as Petitioner's Exhibit No. 6 and introduced into evidence as such.

(WHEREUPON, the document referred to was marked Petitioner's Exhibit No. 6 for purposes of identification and received in evidence.)

By Mr. Battle:

Q Does that also contain the conditions of sale on the reverse side of the form that is sent to the customer?

A Yes, it does.

Q I believe you said you were associated with the Cincinnati Office?

A That's right.

[173] Q District office. Does that office cover or have responsibility for the entire State of West Virginia?

A Oh, no. Our Pittsburgh Office also covers part of this state.

Q Does the Pittsburgh Office operate in essentially the same manner as the Cincinnati Office in terms of sales?

A Yes, they do. They have two salesmen travelling out of their district as we do coming down here to Huntington and the Charleston area.

Q So that out of the Cincinnati District there are two salesmen that visit West Virginia and out of the Pittsburgh District Office, there are two salesmen that visit their geographic territory that is assigned to this state?

A That is correct.

Q Are any of these salesmen residents of West Virginia?

A No.

Q Do these salesmen have a specific geographic territory assigned to them?

[174] A Yes, they do.

Q Would any of them have only West Virginia as their sales territory?

A No, they have other business in Ohio and Indiana, Kentucky.

Q Pennsylvania?

A Right, in the case of Pittsburgh, right.

Q What would you say would be the average frequency of visits by these salesmen into West Virginia?

A Generally speaking, every four to six weeks. I understand, one salesman in Pittsburgh calls in Wheeling, West Virginia, twice a month.

Q Do you know how many salesmen in the Union Wire Rope Division have responsibility for West Virginia?

A Yes, there are three.

Q Where are they located?

A Well, in Ashland, Kentucky and Pittsburgh, Pennsylvania or Greensboro, North Carolina.

Q Do you know the frequency of their visits, as far as West Virginia business is concerned?

A Yes, once or twice a month.

[175] Q Are any of those three salesmen residents of West Virginia?

A No.

Q Now, in the normal course of operating the sales offices,

are orders placed directly with the salesmen at the time they make one of these visits to customers in West Virginia?

A Be a rare case, not normally at all. It would be strictly a coincidence if they were able to carry an order out of the purchasing agents office.

Q The orders then, are generally submitted, of course, at the convenience of the customer and it doesn't always coincide with the visit of the salesman?

A That's correct.

Q Do these salesmen have any specific authority to accept or reject orders?

A No, they don't. The conditions of sale specifically say that all orders are subject to acceptance at the sellers office, that's the home office and that's at Middletown, Ohio[.]

Q So, that's under the terms and conditions of **[176]** sale and the orders are accepted at the office in Middletown, Ohio, which is the general Headquarters of Armco Steel Corporation, is that correct?

A That's right.

Q Once one of these orders is accepted, how are the goods generally shipped to customers in West Virginia?

A By either common carrier or truck or rail.

Q Now, taking the Steel Division, where would those goods come from, generally?

A In this area, mostly from Ashland, Kentucky; Middletown, Ohio or Marion, Ohio.

Q Those are the locations of three of the nine manufacturing plants?

A Right.

Q How about the Union Wire Rope, which I believe you said had a manufacturing plant in Kansas City?

A Yes, the products are manufactured in Kansas City, but they have warehouses in Pittsburgh and in Ashland, Kentucky.

Q So that goods purchased by customers in West Virginia would likely be shipped out of either the Ashland **[177]** or the Pittsburgh Warehouse?

A Right. And orders would be entered there also, and if they had stock on hand they would be made up and shipped right from there.

Q Now, are these salesmen that you referred to actually four Steel Divisions, two from the Cincinnati Office and two from the Pittsburgh Office, do they solicit or deal with sales only of the Steel Division Products as distinguished from Union Wire Rope Products or Metal Products Division Products?

A The salesman sells only the products for his particular division.

Q Now, does either the Steel Division or Union Wire Rope Division own or rent any motor vehicles which are licensed in West Virginia?

A No.

Q Do either of those divisions install, service or repair any products that are sold by it to customers in West Virginia?

A No, they don't.

Q Do either of those divisions have any service **[178]** personnel residing in the State of West Virginia?

A No.

MR. BATTLE: That's all the questions I have.

EXAMINER SKINNER: Mr. Reed.

Cross-Examination by Mr. Reed:

Q What types of sales follow-up activities would occur following a sale, if any? After a sale has been completed, would any of these non-resident salesmen come back into the state?

A To get another order and also to make sure everything was all right, and they would be called back in if the quality was less than standard, for instance. But a follow-up call, of course, would be made to get more business.

Q About how often again would they come into the state?

A About every four to six weeks.

Q Do you ever deliver products, will Steel Division or Union

Wire Rope deliver products into this state in your own trucks?
[179] A In our own trucks?

Q Own vehicles?

A Contract carriers and commercial carriers only, to my knowledge.

Q Would the Union Wire Rope Division ever sell products similar to products sold by the Steel Products Division or Steel Division?

A No, they wouldn't.

Q Or vice-versa?

A No, sir.

MR. REED: I have no further questions.

EXAMINER SKINNER: Mr. Battle.

MR. BATTLE: One further point, Mr. Geary.

Redirect Examination by Mr. Battle:

Q How are the sales made in terms of f.o.b. point or transfer of title? Where does the title of goods that are sold to customers in West Virginia actually pass?

A Regardless of where they are the title passes at the point of delivery to the carrier and is so stated in the Conditions of Sale.

[180] Q That's item 2 of the Conditions of Sale, passage of title. Would you read that first paragraph, please?

A "Title to the product sold hereunder shall pass upon delivery to the carrier at the point of shipment."

Q Is the customer billed for the freight?

A Mostly, we ship freight collect. We do, on occasions, ship prepaid and bill to the customer.

Q So, the customer ends up paying whichever way?

A That's right, ultimately, he pays the freight.

MR. BATTLE: That's all I have.

EXAMINER SKINNER: Mr. Geary, you may stand down.

(Witness stood aside.)

MR. BATTLE: I'd like to now call Mr. Weiford.

(Witness sworn.)

THEREUPON came, ROBERT E. WEIFORD called as a witness on behalf of the Petitioner, who, having been first duly sworn according to law, testified **[181]** as follows:

Direct Examination by Mr. Battle:

Q Would you state your name, age and place of residence, please, sir?

A Robert Ernest Weiford. I'm 42 years old. I reside in St. Albans, West Virginia.

Q Mr. Weiford, by whom are you employed now, and how long have you been so employed?

A I'm employed by Armco Steel Corporation, Metal Products Division. October 3rd, I will complete my 14th year.

Q I wonder if you would give me a brief description of your job with Metal Products Division?

A My job is to promote sales and service of fabricated steel products, predominantly corregated [sic] steel products.

Q What is the sales organization of your division, Metal Products Division?

A Metal Products Division is broken down into four regions and I'm a member of an employee of Great **[182]** Lakes Region-Columbus District, being headquartered in Columbus, Ohio, consisting of the states of Ohio and West Virginia.

Q Do you maintain an office, the Metal Products Division, that is maintain an office in West Virginia?

A Yes, we have an office at 332 Sixth Avenue, South Charleston, West Virginia.

Q How many employees are at that South Charleston Office, Mr. Weiford, and what are their basic duties?

A Well, I'm Senior Sales Engineer and we have two Sales Engineers, Mr. Bibby and Mr. Sernick and we have one secretary, Mrs. Edens. The titles or responsibilities of the Sales Engineers are equivalent and the secretary, of course, does secretarial work.

Q During the years of this assessment, 1970 through 1975, did you have these three Sales Engineers there?

A No, we only had the two, Mr. Bibby and myself.

Q During that six year period then you only had two Sales Engineers, is that correct?

A Yes, that is correct.

Q I wonder if you would give a general description of the products that are sold by the Metal Products Division?

[183] A Well, essentially, we term them construction products. Our predominant products would be culvert pipe, ranging anywhere from 6 inches in diameter to 52 foot span. We also sell plastic and fiberglass reinforced plastics to the utility market, you might say.

Q Now, do those two salesmen that were working out of the South Charleston Office, yourself and Mr. Bibby in the year '70 and '75, between the two of you, did you cover the entire State of West Virginia?

A The state was broken down less than northern and eastern panhandles to essentially a north and south territory with Mr. Bibby covering the northern half of the state and me covering the southern half. I had additional responsibility, with what I call specifying agencies, being the West Virginia Department of Highways and United States Corps of Engineers.

Q Now, did you and Mr. Bibby or anybody associated with the South Charleston Office of Metal Products Division, have any authorization or responsibility for selling products other than those you just described, that is the construction products of your division?

[184] A No.

Q What about the, what about the metal buildings, Mr. Geary mentioned those?

A That is actually a separate department within the division and our steel buildings are handled through franchised agents. So, no, I have no responsibility for steel buildings, whatsoever.

Q Does anybody at the South Charleston Office have any responsibility for steel buildings?

A No.

MR. BATTLE: Mr. Examiner, in reviewing the audit and more particularly the sales figures for the Metal Products Division, there was no breakdown between the buildings, the metal buildings and the Construction Products sales. I would like to ask leave to submit such a schedule showing that

breakdown for the six years involved. I do not have that breakdown here this afternoon, but we'd like to submit that, tying it into the audit figure of the total.

EXAMINER SKINNER: Very well, I think that could be helpful and the record, this breakdown between metal **[185]** buildings and the construction products will be marked and received into evidence as Petitioner's Exhibit No. 7 when it is received. How long do you think it will take you to get that in, Mr. Battle?

MR. BATTLE: Ten days.

EXAMINER SKINNER: Very well then, ten days from the date of this hearing that will be due.

(WHEREUPON, the audit figure referred to will be marked Petitioner's Exhibit No. 7 upon receipt, for purposes of identification and received in evidence.)

By Mr. Battle:

Q Now, Mr. Weiford, do any of the South Charleston office personnel provide any contact or service to the Steel Division that Mr. Geary described or the Union Wire Rope Division with respect to products that are sold by those divisions?

A No.

Q Have you or any of the employees at the **[186]** South Charleston office ever been requested to check any credit or collect past due accounts for one of the other divisions?

A No.

Q Does the Metal Products Division and, more particularly, your department the Construction Products utilize this same terms and conditions of sale as are used by the Steel Division and Union Wire Rope Division?

A Yes, sir, I think you'll find on the back of our quotation form similar terms and conditions of sale.

Q I'll hand you now two forms and ask if you will identify those, please?

A Yes, sir, the first one you handed me is our quotation form which is clearly stated and it includes the conditions of sale on the back and the second form you handed me is an office order write-up form with conditions of sale on the back.

MR. BATTLE: Mr. Examiner, I'd like to submit these two documents as Petitioner's Exhibits No. 8 and 9. I'm giving Mr. Reed copies of the same.

EXAMINER SKINNER: Very well, the Armco Steel **[187]** Corporation Quotation Form, Metal Product Division will be marked as Petitioner's Exhibit No. 8 and received into evidence as such, and the Armco Steel Corporation Metal Products Division Order Write-up form will be marked as Petitioner's Exhibit No. 9 and introduced into evidence as such.

(WHEREUPON, the documents referred to were makred [sic] Petitioner's Exhibits Nos. 8 and 9 for purposes of identification and received in evidence.)

By Mr. Battle:

Q Mr. Weiford, under the conditions of sale appearing on these documents, is it true that title to the products sold to customers pass upon delivery to the carrier at the point of shipment?

A Yes, sir.

Q Where, generally, are goods shipped to West Virginia customers, that is, goods consisting of the construction of products sold by you and your fellow sales engineers from the South Charleston office?

[188] A I'm sorry, Mr. Battle, I don't understand your question.

Q I'm sorry. From what points would goods be shipped to customers in West Virginia resulting from the activities of your work or Mr. Bibby's work?

A Most of our products would be shipped out of our Summit Plant, which is outside of Ashland, Kentucky.

Q Is that Summit, Kentucky?

A Summit, Kentucky and Middletown, Ohio. We do also ship on a lesser scale from Baltimore, Maryland and Raleigh, North Carolina.

Q Is any billing done by the South Charleston office, that is,

do you send bills to customers from your South Charleston office?

A No.

Q How about payments, are any payments made there?

A No.

Q Now, you stated earlier that the Metal Buildings Department of Metal Products Division was not part of the activities of your South Charleston office. **[189]** Do you know where those items would be shipped from to a customer in West Virginia?

A Yes, they would, essentially, come from Washington Court House, Ohio.

Q Is that where their manufacturing or assembly plant is?

A That's where they're fabricated.

Q To your knowledge, do the terms and conditions of sale as described on the Quotation Form and the Write-up Form submitted here, are those terms and conditions of sale generally applicable to all Armco products?

A I would have to answer generally, yes.

MR. BATTLE: That's all the questions I have, Mr. Examiner.

EXAMINER SKINNER: Mr. Reed.

Cross-Examination by Mr. Reed:

Q As to the steel and metal buildings, I believe you stated that those could be handled only through franchised agents?

A Yes, sir.

[190] Q Are any of those franchised agents residents of West Virginia?

A Yes.

Q Does the Metal Products Division have any personnel that services any of the products sold by it in West Virginia?

A I'm sorry Mr. Reed, I don't understand.

Q Any service personnel?

A From South Charleston, West Virginia?

Q Yes.

A Servicing Metal buildings?

Q Yes. Metal buildings or the other type of products, excuse me, not the metal buildings, but the construction products?

A Yes.

Q Would the South Charleston office have service personnel that would service the metal buildings?

A No.

MR. REED: I have no further questions.

Cross-Examination by Mr. Stajduhar:

[191] Q Mr. Weiford, would there be any sales by the Metal Products Division to a West Virginia customer that would not be solicited by either yourself or some other salesman operating out of the South Charleston office?

A Yes.

Q How would those sales be solicited?

A Listed?

Q Solicited?

A By someone such as myself. For instance, on an example would be American Electric Power in New York City and they would solicit, they would receive the purchase order and they would order the material and quite possibly ship it into West Virginia.

Q Let's say that for some reason the products were not quite to specifications, there was some problems, who would do the servicing on those products in West Virginia?

A Myself or someone from my office.

MR. STAJDUHAR: I have no further questions.

EXAMINER SKINNER: Mr. Battle.

Redirect Examination **[192]** by Mr. Battle:

Q Do you know how many franchise agents deal with Armco Metal Buildings in West Virginia?

A I know of two and that's Wilson of St. Albans and Tri-State of Huntington, West Virginia.

Q Do you happen to know what the arrangement is with respect to, the arrangement between Wilson or Tri-State or Armco? Do they buy the buildings from Armco and resell them? Are you familiar with the terms of their agreement, franchise agreements?

A I'm not familiar with i.. I would just as soon not comment.

MR. BATTLE: That's all the questions I have for Mr. Weiford.

EXAMINER SKINNER: Very well then, I think you may step down now.

(Witness stood aside.)

EXAMINER SKINNER: I assume at this time we have completed the presentation of the evidence by both sides. Mr. Battle, you have completed your presentation of the evidence?

[193] MR. BATTLE: Just one moment. Yes, we have.

EXAMINER SKINNER: Let's go off the record.

(WHEREUPON, discussion was had off the record.)

EXAMINER SKINNER: On the record, Mr. Reed, did you have something you wish to ask for?

MR. REED: Yes, Mr. Examiner. The State would like in the form of a motion, request three different types of documents or schedules be submitted at the time its initial brief is submitted in order to clarify the factual situation, especially, in light of the fact the Taxpayer's witnesses themselves have testified to the fact that there was quite a fluctuation of prices in '74.

So, the first request would go to the Taxpayer for furnishing a copy of the contracts with General Coal Company. The second would go to the average purchase prices under the General Coal Company contract for the year 1972 through 1975. I believe the witness has testified as to the year 1974. The third request would go to the source documents for the Taxpayer's average composit [sic] figure for the year 1974.

[194] EXAMINER SKINNER: Very well. Mr. Battle, if you, since off the record we discussed the possibility of briefs and you indicated you would be favorable to the idea of filing briefs in this matter, what I will do is set an initial 30 day period for the filing of your brief, 30 days starting to run from tomorrow which would make it the 24th of June. And, when that brief is submitted, please include these three pieces of

information that the State's representative has requested. They can simply be attached to the brief and submitted in that manner.

After the 30 days have run or at the time of the submission of the Taxpayer's brief, Mr. Reed will be given 30 days in which to file a reply brief. And finally, Mr. Battle, you will be given 15 days from the date of your receipt of the State's reply brief to file any reply in this matter, that you would deem appropriate.

Is there anything further that either party can think of that should be discussed at this time, before we go off the record?

MR. REED: I have nothing.

EXAMINER SKINNER: Mr. Battle?

[195] MR. BATTLE: No, I don't have anything further to submit at this time.

EXAMINER SKINNER: Very well then, this hearing will be considered as submitted pending the receipt of the previously mentioned submissions and the briefs.

(WHEREUPON, the hearing in the above-entitled matter was submitted.)

Subsequent to the time of the hearing, Petitioner's Exhibits Number 10 & 11 were submitted and received into evidence as part of the record.

[Reporter's Certificate omitted in printing.]

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NO. 83-297

IN THE

Supreme Court Of The United States

OCTOBER TERM, 1983

ARMCO, INC.,

Appellant,

v.

DAVID C. HARDESTY, JR.
State Tax Commissioner of West Virginia

Appellee.

ON APPEAL FROM THE
SUPREME COURT OF APPEALS
OF WEST VIRGINIA

MOTION TO DISMISS OR AFFIRM

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QUESTIONS PRESENTED

The appellee respectfully disagrees with the appellant's presentation of the questions raised by the Jurisdictional Statement and feels the following more fairly represents the questions presented for review:

1. Whether sufficient nexus exists with regard to appellant's sales to West Virginia customers to allow West Virginia, consistent with Due Process Clause and Commerce Clause requirements, to impose its business and occupation privilege tax on appellant's in-State selling activities.

2. Whether the principles of the unitary business concept are appropriate in determining whether a corporation has entered a State in such a fashion that nexus with regard to any one of its activities may be determined based upon the local character it has assumed through its overall in-State operations.

3. Whether the imposition of the West Virginia business and occupation tax upon appellant's business activity of making wholesale sales in West Virginia discriminates against interstate commerce.

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MOTION TO DISMISS OR AFFIRM

The appellee moves the Court to dismiss the appeal herein or, in the alternative, to affirm the judgment of the Supreme Court of Appeals of West Virginia on the grounds that it is manifest that this appeal does not present a substantial federal question, that the

judgment below clearly rests on an adequate nonfederal basis, and on other grounds which the appellee will present herein which establish that this Court should not set this case for argument.

OPINIONS BELOW

The opinion below by Justice Miller of the Supreme Court of Appeals of West Virginia is reported as Armco, Inc. v. Hardesty, __ W.Va. __, 303 S.E.2d 706 (1983). A copy of the opinion below is set out in full in the Appendix, appended to appellant's Jurisdictional Statement.

The December 30, 1980, memorandum opinion of the Circuit Court of Kanawha County, West Virginia, and the Kanawha County Circuit Court's judgment of July 20, 1982, are set out in full in

the Appendix, appended to appellant's Jurisdictional Statement.

JURISDICTION

The proceeding below began with an assessment of tax under the West Virginia business and occupation tax, Chapter 11, Article 13, of the West Virginia Code of 1931, as amended. The assessment was upheld by the Tax Commissioner of the State of West Virginia upon evidence taken at an administrative hearing. Upon timely appeal to the Circuit Court of Kanawha County, the Tax Commissioner's decision was reversed and the assessment was expunged. The Circuit Court's decision was reversed by the Supreme Court of Appeals of West Virginia, and judgment was entered in favor of the appellee.

The judgment of the Supreme Court sought to be reviewed was entered on May 25, 1983. The appellant filed a Notice of Appeal to this Court with the Supreme Court of Appeals of West Virginia on August 19, 1983.

The asserted jurisdiction of the Supreme Court to hear this appeal rests upon 28 U.S.C. § 1257(2).

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

The Fourteenth Amendment to the Constitution of the United States provides in Section 1 as follows:

> "All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State where they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United

States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws." U. S. Const. amend. XIV, § 1.

The relevant portions of the Commerce Clause of the Constitution, as found in Article I, Section 8, provide as follows:

> "The Congress shall have Power To lay and collect Taxes, Duties, Imposts and Excises, to pay the Debts and provide for the common Defence and general Welfare of the United States; but all Duties, Imposts and Excises shall be uniform throughout the United States;
>
> "To borrow Money on the credit of the United States;
>
> "To regulate Commerce with foreign Nations, and among the several States and with the Indian Tribes." U. S. Const., art. I, § 8.

West Virginia Code of 1931, as amended, Chapter 11, Article 13, Section 1, which is set out in full in the Appendix appended to appellant's Jurisdictional Statement.

West Virginia Code of 1931, as amended, Chapter 11, Article 13, Section 2, which is set out in full in Appendix appended to appellant's Jurisdictional Statement.

West Virginia Code of 1931, as amended, Chapter 11, Article 13, Section 2a, which is set out in full in the Appendix appended to appellant's Jurisdictional Statement.

West Virginia Code of 1931, as amended, Chapter 11, Article 13, Section 2b, which is set out in full in the Appendix appended to appellant's Jurisdictional Statement.

West Virginia Code of 1931, as amended, Chapter 11, Article 13, Section 2c, which is set out in full in the Appendix appended to appellant's Jurisdictional Statement.

STATEMENT OF THE CASE

Armco, Inc., is an Ohio corporation qualified to hold property and do business as a foreign corporation in the State of West Virginia. During the period in question, January 1, 1970, through December 31, 1975, Armco carried on extensive business activities in West Virginia resulting in its payment of tax under the following business and occupation tax classifications: coal production (Chapter 11, Article 13, Section 2a, of the West Virginia Code of 1931, as amended); retail sales (Code 11-13-2c); wholesale sales (Code 11-13-2c); contracting (Code 11-13-2c); and furnishing property for hire (Code 11-13-2i). Armco acknowledged its in-State presence and taxability in the above areas but objected to the imposition of tax on wholesale sales made to West Virginia customers by certain of

its internal divisions. Armco contended that the operations of those divisions when viewed separately from its total in-State business did not have sufficient nexus with West Virginia.

Armco divides its organization into operating groups or divisions. Among those groups, separate manufacturing divisions are responsible for the marketing and sale of that division's products. Three manufacturing divisions made the wholesale sales at issue to West Virginia customers during the period involved. The divisions are: Steel Group; Union Wire Rope; and Metal Products.

The Steel Group manufactures practically all steel mill products with emphasis on high quality steels for specific needs. None of the Steel Group's

manufacturing facilities are located in West Virginia. The Steel Group has district sales offices in Cincinnati, Ohio, and Pittsburgh, Pennsylvania, that have responsibility for territories which include portions of West Virginia. During the audit period appellant's Steel Group Division employed four salesmen who solicited business within West Virginia. Such salesmen entered this State as often as twice a month to consult with clients concerning products available from appellant and possible future needs. Though not normal business procedure, such salesmen at times received orders from in-State customers on behalf of Armco. After a customer's order was filled, Armco's sales representatives made follow-up calls to check customer satisfaction with the quality

of the products sold and to solicit future orders. In addition, occasionally representatives of the Steel Group were called upon to investigate client complaints and perform service work within West Virginia.

The Union Wire Rope Division produces wire rope slings and accessories at its mill facilities in Kansas City. Wire Rope has three salesmen having responsibilities in West Virginia. Those salesmen are associated with Wire Rope's offices in Ashland, Kentucky, Pittsburgh, Pennsylvania, and Greensboro, North Carolina, and made one or two trips a month to West Virginia to consult with customers.

The Metal Products Division produces and sells construction products,

corrugated metal pipe, retaining wall, guard rail, plastic sewer pipe, floodgates, buildings, and so forth. Said division maintains office facilities at South Charleston, West Virginia, from which its employees solicit sales from customers throughout West Virginia. The South Charleston office has responsibility for selling all of the Metal Products Division's products except metal buildings. Armco created a separate department within the Metal Products Division through which the sale of metal buildings are handled in cooperation with franchise agents. The franchise agents are West Virginia residents operating businesses in this State. Armco allows said agents to whom it makes wholesale sales to display its corporate name and trademark at their place of

business and in advertisements. Additionally, Armco shares advertising expenses with its agents to promote sales to ultimate customers.

All sales by any of Armco's divisions are subject to acceptance at Armco's home office at Middletown, Ohio. Goods are generally shipped to West Virginia customers by common carrier, truck or rail. Title to such goods under Armco's conditions of sale passes to the customer upon delivery to the carrier at the point of shipment.

Assessment was made against Armco in 1977 for business and occupation taxes for the years 1970 through 1975 based on its total wholesale sales made to West Virginia customers. Such assessment was affirmed, less penalty, by the West Virginia State Tax Commissioner

in his administrative decision issued December 10, 1977. Armco appealed the Tax Commissioner's administrative decision to the Circuit Court of Kanawha County where the decision was overruled and the assessment vacated.

The Kanawha County Circuit Court found there was insufficient nexus to support the business and occupation tax assessed. Such decision was based upon the court's finding that Armco's in-State selling activities did not constitute a substantial enough nexus. The Court further held that the nexus required must be between the state and the activity or transaction in question and not merely between the state and other business activities of the taxpayer.

The West Virginia State Tax Commissioner appealed the Kanawha County

Circuit Court's decision to the Supreme Court of West Virginia. In an opinion issued May 25, 1983, the West Virginia Supreme Court reversed the Circuit Court and found there was sufficient nexus to support the taxation of the sales at issue. Such decision was based upon the Court's finding that Armco was a unitary business corporation conducting its business activity under one corporate umbrella. As a unitary business the Court concluded that the question of nexus must be resolved by examination of the full scope of Armco's in-State business operations and not by separate inquiry into each of its transactions.

ARGUMENT

I.

WEST VIRGINIA'S TAXATION OF APPELLANT'S IN-STATE SELLING

ACTIVITIES IS CONSISTENT WITH NEXUS REQUIREMENTS GOVERNING THE PERMISSIBLE TAXATION OF INTERSTATE BUSINESS.

Since the first two questions presented for review are closely interrelated, the appellee will consolidate its argument into a single presentation.

Chapter 11, Article 13, Sections 2 and 2c, of the West Virginia Code of 1931, as amended, jointly levy a privilege tax on sellers of property and provide that the said business and occupation tax is to be imposed, "upon every person engaging or continuing within this State in the business of selling any tangible property". Appellant's selling activities in West Virginia with regard to the sales of the products at issue are a matter of record and clearly constitute engaging in the business of selling.

Appellant does not deny its presence in West Virginia but alleges that its in-State selling activities are insufficient to supply the nexus necessary to permit their constitutional taxation. Appellant further contends that its other in-State business operations are not relevant to the nexus question relating to its sales activities.

The West Virginia Supreme Court of Appeal's decision determined that in addition to the business activities strictly associated with the sales at issue the sufficiency of nexus must be determined in light of a corporation's total in-State activities. The lower Court's decision in this case refused to examine appellant's sales activities in isolation from its total West Virginia business operation. The West Virginia

Supreme Court, recognizing a long line of precedent established by this Court, reviewed the nexus issue in terms of the full scope of appellant's in-State business activities. The lower Court observed that the principles of the unitary business concept were appropriate in reviewing the nexus question in this case.

One of the first cases dealing with the taxation of interstate commerce decided pursuant to nexus standards was Norton Co. v. Department of Revenue of the State of Illinois, 340 U.S. 534 (1951). In that case the State of Illinois attempted to tax interstate sales made by Norton Company to Illinois residents. The Court determined that when such sales involved orders sent directly to Norton's out-of-state headquarters by the Illinois customer and shipped

directly to the customer from said headquarters, there was no local incident upon which to base the tax. The Court did not consider whether Norton's other Illinois business activities contributed to the sales in question and thus provided the connection required by the Due Process Clause and Commerce Clause.

Justice Clark's dissent in Norton Co. supra, recognized that the multitudinous activities of a corporation in a state can give that corporation a local character which in a very real sense contributes to all of its operations in the state. The dissent concluded that when a corporation has undertaken in-state business activities of such magnitude that it has assumed a hometown label and received the manifold advantages

of such label, nexus is supplied by the operation of the business as a whole. Justice Clark's recognition of the fact that each aspect of a business contributes to all other aspects was an application of the unitary business concept.

The next significant case addressing nexus requirements was General Motors Corp. v. Washington, 377 U.S. 436, (1964). In that case General Motors contested the taxation of sales of automobiles, parts, and accessories shipped from out of state to in-state dealers on their direct orders. Although the factual situation was quite similar to Norton, supra, the Court in General Motors adopted Justice Clark's position that the local incident necessary to sustain the tax was provided by

General Motors business activities within the State as a whole. the Court stated:

> "Although mere entry into a State does not take from a corporation the right to continue to do an interstate business with tax immunity, it does not follow that the corporation can channel its operations through such a maze of local connections as does General Motors, and take advantage of its gain on domesticity, and still maintain that same degree of immunity."
> 377 U. S. at 448.

Justice Goldberg's dissent in General Motors supra, recognized that the majority's opinion was a departure from Norton, supra, in that the transaction at issue was no longer considered separately from the corporation's total in-state business.

Shortly after the General Motors decision, the Court again considered

nexus requirements in American Oil Co. v. Neill, 380 U.S. 451. (1965). Appellant contends that the American Oil decision represented an affirmation by the Court of the transactional nexus approach of Norton Co., supra, and a qualification of the General Motors, supra, unitary concept. Appellee submits that examination of the case reveals the contrary.

In American Oil the State of Idaho attempted to tax a sale of gasoline which occurred wholly in the State of Utah. The facts of the case clearly demonstrated that every phase of the sales transaction, from the initial negotiations to the completed delivery, occurred outside of Idaho. The Court concluded that there was simply no in-state activity connected with the out-of-state sales transactions upon which

to base the tax. The Court further held that the local incident or minimum connection necessary, unlike in General Motors, supra, was not provided by the taxpayer's other in-state operations. The Court found that there was no indication that the taxpayers other activities in Idaho contributed to the procurement or performance of the taxable event.

Rather than a qualification or deviation from the due process nexus rationale developed in General Motors, the American Oil, supra, decision simply represents an application of General Motors. A corporation's in-state business activities which lend to it a local character with its attendant goodwill certainly contribute to the success of its other less local in-state business activities. However, where the entire

activity sought to be taxed is completely outside the taxing state, such as American Oil's sales at issue, the local presence established by the corporation cannot be said to have contributed to the sale.

The American Oil, supra, decision did not alter the unitary business approach to the nexus questions enunciated in General Motors, supra,. The factual circumstances developed in American Oil clearly did not establish any in-state activity, associated with the sales in question, which could be regarded as a part of the corporation's unified in-state business operations. The unitary concept was simply inapplicable to that case.

In a recent series of cases, the vitality of the unitary approach to the question of the interrelationship of a

corporation's business activities was clearly demonstrated. In addressing the question of what aspects of a corporation's total income may be subject to a state's apportioned tax, this Court made use of the unitary business concept. The holding in such cases is less important to this case than the underlying reasons the unitary approach was utilized.

In Justice O'Conner's dissent in Asarco Inc. v. Idaho State Tax Comm'n, 102 S. Ct. 3103 (1982), it is noted that the unitary business principle was designed to solve the insoluble problem of dividing businesses. This Court has consistently recognized that it is impossible to precisely determine to what degree one portion of a business aids another and how much the integration of

the business adds to the profitability of each of its parts. This Court in Mobile Oil Corp. v. Commissioner of Taxes of Vermont, 445 U.S. 425 (1980) observed that the factors of profitability arise from the operation of a business as a whole and that it is misleading to characterize the income of the business as having a single identifiable source. The recognition by this Court that every aspect of a unified business contributes to all other aspects is a logical corollary to Justice Clark's proposition that a corporation's bundle of in-state corporate activity provides it a local character which is most helpful in all its in-state operations.

In Container Corp. of America v. Franchise Tax Board, 103 S. Ct. 2933

(1983), this Court analyzed the unitary business concept as follows:

> "A final point that needs to be made about the unitary business concept is that it is not, so to speak, unitary: there are variations on the theme, and any number of them are logically consistent with the underlying principles motivating the approach.
> * * *" 103 S. Ct. at 2941

It is plain that the unitary business concept has application to a number of tax issues which require analysis of the interrelationship of a business' various facets. This Court in Asarco, supra, acknowledged that the unitary principle had been a familiar concept in tax cases for more than sixty (60) years.

The West Virginia Supreme Court's determination that appellant's in-State selling activities were a part of its unitary business operation was clearly

correct. Appellant, in fact, has never submitted that its selling activities were not a part of its unified business. The Supreme Court's utilization of the unitary concept in the instant case is consistent with this Court's own use of such concept and is not in conflict with the disassociation principle of Norton Co., supra.

In Standard Pressed Steel Co. v. Washington Department of Revenue, 419 U.S. 560 (1979), this Court in discussing Norton Co., noted that the division in the Court in that case was not over the case's governing principle but rather over "the burden of showing a nexus between the local office and interstate sales - whether a nexus could be assumed and whether the taxpayer had carried the burden of establishing its immunity."

In other words, the Court agreed that if a transaction was completely disassociated from a corporation's other in-state activity and totally interstate in nature it was not taxable. The relevant question was however what constituted such a disassociation.

General Motors, supra, adopting a form of the unitary concept, held that the required disassociation was not present when the taxpayer's other in-state activities provided it a domestic character which contributed to its interstate business. In Mobile Oil, supra, and then in Exxon Corp. v. Wisconsin Dept. of Revenue, 447 U.S. 207 (1980), this Court addressed the principles of the unitary business concept and held that for an activity to be disassociated from the taxpayer's other business the

business activity at issue must constitute a discrete business enterprise. Application ot the unitary concept in Exxon Corp., clearly established that the mere operation of a corporation on a divisional basis does not establish a disassociation between the divisions.

In the present case, appellant has not established any of the requirements enunciated in Norton Co., supra, which would establish its local sales as immune from state taxation. First, appellant's sales activities are not purely interstate in nature. Such sales have definite intrastate aspects which in fact form the subject of the tax levied. Secondly, appellant's sales to West Virginia customers are not disassociated from its overall in-State presence. Regardless appellant's internal division of its operation, it is clear that

each part of its unified business contributes to all other parts.

The disassociation principle in Norton Co. has been defined by subsequent cases as requiring that the disassociation be to such a degree that the activity in question is not contributed to by the corporation's unified in-state operations. Where a corporation's maze of activity lends to it the character of a local merchant, such disassociation is extremely difficult to establish. The burden is on the taxpayer to prove that its activity in question is a discrete business enterprise, totally separate from its unitary business operation. The West Virginia Supreme Court's finding that Armco's sales to local customers were taxable as a part of a unified West Virginia business operation was not in conflict with the general principle

of Norton Co., supra, nor an improper application of the unitary business concept.

II.

THE IMPOSITION OF THE WEST VIRGINIA BUSINESS AND OCCUPATION TAX UPON APPELLANT'S BUSINESS ACTIVITY OF MAKING WHOLESALE SALES IN WEST VIRGINIA DOES NOT DISCRIMINATE AGAINST INTERSTATE COMMERCE.

In its Jurisdictional Statement, appellant asserts that the tax in question discriminates against interstate commerce. The alleged basis of discrimination is the interplay between Sections 2, 2b, and 2c, of Chapter 11, Article 13, of the West Virginia Code of 1931, as amended. Specifically, the fifth paragraph of Code 11-13-2 provides that a person subject to the manufacturing privilege tax provided by Code

11-13-2b is not also subject to the wholesale sales business tax provided by Code 11-13-2c. Appellant contends that since an out-of-State manufacturer has to pay the wholesale sales tax under Code 11-13-2c, while the in-State manufacturer does not, this is discrimination against interstate commerce that violates the Commerce Clause. Appellee submits that the tax in question is not discriminatory in this manner.

First, the standard announced by this Court in determining if a state tax violates the Commerce Clause for being discriminatory is: "No state may, consistent with the Commerce Clause, 'impose a tax which discriminates against interstate commerce * * * by providing a

direct commercial advantage to local business.'" Boston Stock Exchange v. State Tax Commission, 429 U.S. 318, 329 (1977). Further, when determining whether a state tax is discriminatory, the tax must be assessed in light of its actual effect and considered in conjunction with other provisions of a state's taxation scheme. Maryland v. Louisiana, 451 U.S. 725 (1981). This principle was succinctly stated in Halliburton Oil Well Cementing Co. v. Reily, 373 U.S. 64 (1963), as follows: "proper analysis must take 'the whole scheme of taxation into account,'" and "equality for the purposes of competition and the flow of commerce is measured in dollars and cents, not legal abstractions."

Accordingly, the fact that a manufacturer subject to the West Virginia

business and occupation tax on manufacturing (Code 11-13-2b) is not subject to the tax on wholesale sales does not amount to discrimination against interstate commerce. A West Virginia manufacturer is exempt from the wholesale sales tax, imposed at the rate of .27 percent, only if he has paid the tax on manufacturing at the rather substantial rate of .88 percent. Given these different tax rates, it cannot be said that an in-State manufacturer who sells its product in West Virginia is going untaxed while an out-of-State manufacturer is carrying an unfair share of the tax burden. The Legislature saw fit to tax manufacturing at a higher rate and then allow the manufacturer to sell its product at the wholesale level tax free. If the in-State manufacturer sells West

Virginia manufactured products at the retail level, or any other person sells those products at wholesale, such sales are subject to taxation. Thus, the only time that a wholesale sale of West Virginia manufactured products goes tax free is when it is sold by a manufacturer who has paid tax on the manufacturing privilege at a much higher rate. This is an entirely reasonable system of taxation of the manufacture and sale of products in West Virginia that does not discriminate against interstate commerce.

This Court has upheld similar systems of state taxation. In Caskey Baking Co. v. Virginia, 313 U.S. 117 (1941), the tax complained of there was an annual license tax of One Hundred Dollars ($100.00) imposed for each vehicle used in the business of peddling

goods or merchandise. The license tax did not apply to local manufacturers that paid a tax on their capital or local distributors having a fixed place of business in the state who paid a state tax on their purchases. Thus, the practical effect of the statute was that the vehicles of local manufacturers and distributors were exempt from the license tax, while the vehicles of vendors domiciled out of state were subject to the tax. The appellant in the case was a West Virginia bakery that sent its trucks into Virginia to sell bakery goods. This Court held the license tax to be constitutional, upon a finding that the tax in question was but one portion of a reasonable comprehensive scheme of taxation. Also, the Court held that while local manufacturers and distributors were not subject to the tax

on their vehicles, they paid other state taxes which the state deemed sufficient to cover all of their activities, including the vending of goods. The Court in its decision also noted if the license tax was not allowed, the out-of-state vendors would be the only vendors in Virginia to escape some form of taxation.

Likewise, in the case of Alaska v. Arctic Maid, 366 U.S. 199 (1961), cited by the lower court, the tax involved was a 4 percent occupation tax on freezer ships processing fish taken from Alaskan waters. The taxpayer there used freezer ships for the taking and preservation of salmon along Alaska's shores. After freezing the fish, the freezer ship would return to the State of Washington where the fish were canned. The taxpayer claimed discrimination, since fish

that were caught and canned in Alaska were not subject to the 4 percent tax. This Court looked at Alaska's entire scheme of taxation and upheld the tax, saying:

> "It is claimed that there was no tax on salmon caught and frozen in Alaska and destined for canning in Alaska and that therefore this law is discriminatory against freezer ships. Alaskan canneries, however, paid a six-percent tax on the value of salmon obtained for canning; and local fish processors, which sell to the fresh-frozen consumer market, paid a one-percent tax. The freezer ships do not compete with those who freeze fish for the retail market. The freezer ships take their catches south for canning. Their competitors are the Alaskan canners; and we know from the record that fish canned locally usually are not frozen. When we look at the tax laid on local canners and those laid on 'freezer ships,' there is no discrimination in favor of the former and against the latter. For no matter how the tax on 'freezer ships' is computed,

> it did not exceed the six-percent tax on the local canners. * * * If there is a difference between the taxes imposed on these freezer ships and the taxes imposed on their competitors, they are not so 'palpably disproportionate' (International Harvester Co. v. Evatt, 329 US 416, 422, 91 L Ed 390, 395, 67 S Ct 435) as to run afoul of the Commerce Clause. No 'iron rule of equality' between taxes laid by a State on different types of business is necessary." (Citations omitted.) 366 U.S. at 204 - 205.

See also, Gregg Dyeing Co. v. Query, 286 U.S. 472 (1932).

Accordingly, although in-State manufacturers do not pay under the wholesale sales classification of the business and occupation tax, they nevertheless must pay a tax, at a much higher rate, on the entire manufacturing privilege. Given the tax burden placed on the in-State manufacturer, it cannot be

said that appellant pays a disproportionate amount of tax on its in-State sales.

The exact issue presented in this case has been previously presented to this Court in Columbia Gas Transmission Corporation v. Herschel H. Rose, III, Tax Commissioner of West Virginia, 103 S. Ct. 32 (1982). In that case, the identical interplay of the statutes at issue was challenged. The fifth paragraph of Code 11-13-2 exempts from the payment of the State's wholesale sales privilege tax not only those selling products whose manufacture was subject to the State's manufacturing privilege tax but also the sale of natural resource products whose production was subject to the State's production privilege tax. Columbia Gas as an out-of-State producer of natural gas, claimed

that the taxation of its in-State wholesale sales, in light of the exemption accorded in-State producers, acted as a discrimination against interstate commerce. This Court's dismissal of the Columbia Gas appeal should serve as controlling precedent in this case.

CONCLUSION

Counsel for the appellee, David C. Hardesty, Jr., West Virginia State Tax Commissioner, respectfully submits that the decision of the Supreme Court of Appeals of West Virginia is clearly correct; that this appeal does not present a substantial federal question; that the judgment below rests on an adequate non-federal basis; and, that this Court should dismiss this appeal and affirm the decision below.

Respectfully submitted,

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No. 83-297

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State Tax Commissioner of West Virginia,

Appellee.

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BRIEF IN OPPOSITION TO MOTION TO DISMISS OR AFFIRM

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Appellant Armco Inc. submits this brief in opposition to Appellee's Motion to Dismiss or Affirm ("Appellee's Motion"). Armco Inc. states pursuant to Rule 28.1 that the Designation of Corporate Relationships filed as Appendix F to Appellant's Jurisdictional Statement is currently accurate.

This appeal comes down to two irreconcilable views of the nexus required to permit a state to tax the gross receipts from sales made outside the taxing jurisdiction. The Appellant's view is that there must be a substantial relationship between the taxing state and the transactions being taxed, a situation not present in the instant case. That was also the view of the lower West Virginia court herein (Jur. St., App. B), and remains the view of the Supreme Courts of Washington and Alaska. *See Chicago Bridge & Iron Co. v. State Dep't of Revenue*, 98 Wash. 2d 814 (1983), presently on appeal before this Court in No. 82-1848; *Alaska v. Sears, Roebuck*, 660 P.2d 1188 (Alaska 1983).

The Supreme Court of Appeals of West Virginia took a far different view in concluding that, since Armco was a unitary business corporation with some local activities in the State, separate inquiry as to the nexus between the State and the sales transactions in question was not required. Appellee's Motion at 15. It concluded that the required nexus could be found by reference to activities conducted by the taxpayer within the taxing state unrelated to the out-of-state sales transactions being taxed.

The parties are in agreement on the two principles involved and their sources. On the one hand, there is the "dissociation test" of insufficient nexus for imposition of a gross receipts tax arising from *Norton Co. v. Dep't of Revenue of Illinois*, 340 U.S. 534 (1951), *General Motors Corp. v. Washington*, 377 U.S. 436 (1964), *American Oil Co. v. Neill*, 380 U.S. 451 (1965) and *Standard Pressed Steel Co. v. Washington Dep't of Revenue*, 419 U.S. 560 (1975). And on the other hand, there is the "unitary business principle" approved in *Mobil Oil Corp. v. Commissioner of Taxes*, 445 U.S. 425 (1980), *Exxon Corp. v. Wisconsin Dep't of Revenue*, 447 U.S. 207 (1980) and *Container Corp. of America v. Franchise Tax Board*, 103 S. Ct. 2933 (1983). The question presented here is simply whether the dissociation test continues to govern in determining the validity of gross receipts taxes imposed on interstate trans-

actions, or whether it has been superseded by the unitary business principle generally applicable to net income taxes.

The plain fact of the matter is that there is no direct judicial support in the decisions of this Court for the application of the unitary business principle in the area of gross receipts taxes. In striving to bridge this gap between the transactional nexus required by the dissociation test and the overall corporate nexus sufficient for the unitary business test, Appellee's Motion repeatedly suggests that the concededly local aspects of other unrelated Armco activities in West Virginia impart a local character to the entire corporation and somehow taint the out-of-state sales at issue here sufficiently to warrant taxation of the gross receipts from those sales. This elevates the unitary business principle to new heights. If the *Norton* dissociation test is now to be discarded, its replacement by extension of the unitary business principle ought to be expressly made by this Court and not left to inference or conjecture.

With respect to the discrimination issue herein, Appellee's Motion does not deny that a heavier tax burden would be imposed on transactions in interstate commerce involving two or more states with statutes identical to the West Virginia business and occupation tax. This is the type of unfairness described as violative of the Commerce Clause in *Container Corp. of America v. Franchise Tax Board, supra*, at 2942.

Finally, the Appellee's Motion states twice that the judgment below "rests on an adequate nonfederal basis." Appellee's Motion at 2, 42. Appellant respectfully submits that there is no basis for that assertion.

CONCLUSION

For the foregoing reasons, the Motion to Dismiss or Affirm should be denied and this Court should note probable jurisdiction and grant plenary consideration of this appeal.

Dated: November 23, 1983

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APPELLANT'S BRIEF ON THE MERITS

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QUESTIONS PRESENTED

The following questions are presented by this appeal.

1. Whether the Due Process Clause and the Commerce Clause require a substantial nexus between a state levying a gross receipts tax on sales outside the state and the activity or transaction subjected to such tax.

2. Whether the "unitary business" principles applicable with respect to taxes on net income may be extended to state gross receipts taxes so as to permit a finding of sufficient nexus by reason of a taxpayer's activities in the taxing state which are unrelated to the taxed transaction.

3. Whether the Commerce Clause prohibits a state from imposing a non-apportioned gross receipts tax on wholesale sales of property manufactured outside the state, where an exemption from the tax is provided with respect to wholesale sales of property manufactured within the state.

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OPINIONS BELOW

The opinion of the Supreme Court of Appeals of West Virginia has not been officially reported, but it may be found at 303 S.E.2d 706 (W. Va. 1983). The opinion of the Circuit Court of Kanawha County, West Virginia, is not reported. Those opinions are reprinted in Appendices A and B, respectively, to Appellant's Jurisdictional Statement ("J.S.") at pages 1a and 25a.

JURISDICTION

On May 25, 1983, the Supreme Court of Appeals filed its opinion and entered its final order (Appendix D, J.S. 51a) reversing the judgment of the Circuit Court and remanding the action to the Circuit Court for disposition in accordance with such opinion.

On August 19, 1983, Appellant's Notice of Appeal (Appendix E, J.S. 53a) was filed in the Supreme Court of Appeals and in the Circuit Court, the court then possessed of the record. The time within which to docket this appeal expired on August 23, 1983, and timely docketing was made. This Court noted probable jurisdiction on December 12, 1983.

The jurisdiction of this Court is invoked under 28 U.S.C. § 1257(2).

CONSTITUTIONAL AND STATUTORY PROVISIONS

United States Constitution, Article 1, Section 8, Clause 3 (the "Commerce Clause"):

> The Congress shall have Power . . . To regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes . . . .

United States Constitution, Amendment XIV, Section 1 (the "Due Process Clause"):

> [N]or shall any State deprive any person of life, liberty, or property, without due process of law . . . .

West Virginia Code, Sections 11-13-1, 11-13-2, 11-13-2a, 11-13-2b and 11-13-2c, are reprinted in pertinent part in Appendix G to the Jurisdictional Statement at pages 57a *et seq*.

STATEMENT OF THE CASE

Business and Occupation Tax

The focus of this appeal is on Article 13 of Chapter 11 of the West Virginia Code of 1931, as amended, which imposes an annual business and occupation tax upon the exercise of the privilege of engaging in various types of businesses in West Virginia. *See* Appendix G, J.S. 57a-63a. To the extent relevant here, the amount of tax due is computed by the application of varying rates of tax to the gross receipts from sales of tangible property and to the value of products manufactured and coal mined within the state. For purposes of this proceeding, three applications of the business and occupation tax are of particular importance.

Wholesale Sales. The tax is imposed upon the gross receipts realized from wholesale sales of tangible property by persons engaging or continuing within the state in the business of selling tangible property. It is this application of the tax which is at issue in this proceeding. During the years involved here, the rate of tax was 0.25 percent and later 0.27 percent of the gross receipts from such sales. W. Va. Code § 11-13-2c.

Manufacturing. The tax is also imposed upon persons engaging or continuing in the business of manufacturing within the state. Manufacturers liable for this tax on manufacturing activities are exempt from the tax on wholesale sales of the manufactured goods. During the years 1970 through 1975 the rate of tax was 0.80 percent and later 0.88 percent of the value of the manufactured goods, defined to be gross proceeds from the sale of such goods. W. Va. Code §§ 11-13-2 and -2b.

Coal Mining. Finally, the tax is imposed upon persons engaging or continuing within the state in the business of mining coal. Armco acknowledged its liability for this tax and paid appropriate taxes for the years 1970 through 1975. The rate of tax varied from 1.35 percent to 3.85 percent of the

value of the coal mined during the years 1970 through 1975. W. Va. Code § 11-13-2a.

Facts

Armco is an Ohio corporation qualified to hold property and conduct business as a foreign corporation in West Virginia. This appeal centers upon the applicability of the West Virginia business and occupation tax to wholesale sales by Armco of three of its product lines to customers in West Virginia. The products involved are steel (manufactured by Armco's Steel Group division), wire rope (manufactured by Armco's Wire Rope Group division), and metal buildings (manufactured by Armco's Metal Products division). All of these contested sales had the following attributes in common:

(i) No salesmen resident in West Virginia were employed (Joint Appendix ("J.A.") 16, 19, 24);

(ii) No manufacturing facilities were maintained in West Virginia (J.A. 16, 27);

(iii) No sales or other offices were maintained in West Virginia (J.A. 16, 24);

(iv) No inventories of these products were maintained in West Virginia (J.A. 16, 27);

(v) All orders for these products were accepted or rejected outside West Virginia (J.A. 20, 27);

(vi) All of the products were shipped by common carrier from outside West Virginia, and title to the products was transferred to the purchaser outside West Virginia (J.A. 20, 21, 22, 27); and

(vii) Armco did not install, service or repair any of these products sold to customers in West Virginia (J.A. 21, 28).

With regard to the solicitation within West Virginia of orders for the sales at issue, all of the metal buildings were sold by

Armco to two franchised dealers, and there was no solicitation of orders for those sales in West Virginia.[1] J.A. 24, 28. Orders for sales of steel products were solicited in West Virginia by two nonresident salesmen from an Armco office in Pennsylvania and two nonresident salesmen from an Armco office in Ohio. These salesmen visited West Virginia on an average of every four to six weeks (with one of the salesmen from the Pennsylvania office visiting West Virginia twice a month). J.A. 19, 21. Orders for wire rope products sales were solicited in West Virginia by three nonresident salesmen operating from Armco sales offices in Pennsylvania, Kentucky and North Carolina. These salesmen visited West Virginia once or twice each month. J.A. 19. Steel salesmen did not handle wire rope products, and wire rope salesmen did not handle steel products. J.A. 21. In addition, the Circuit Court found that "about 77 percent of these West Virginia sales of steel and wire rope products are to three customers whose orders are solicited without this state." J.S. 26a.[2]

Also relevant to this appeal is a brief description of Armco's business activities in West Virginia other than the sales of the three product lines at issue. Those activities were of two types during 1970 through 1975. First, Armco conducted a substantial coal mining, cleaning and sales business in West Virginia. J.A. 11. And second, Armco's Metal Products division maintained an office in West Virginia staffed by two sales engineers and a secretary. J.A. 23. Construction and drainage products manufactured by the Metal Products division were sold by that office, but it was not involved in the sales of steel, wire rope or metal buildings described above. J.A. 24. No dispute is presented here as to the amount of tax owed by Armco to West Virginia with respect to its coal activities or to the activities of its Metal Products division sales office within the state.

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1 Armco's agreements with these dealers provided that the dealers could use Armco's name and trademark, and that Armco would share advertising expenses with them.

2 This finding of fact was apparently based upon testimony with respect to sales figures for the year 1976. J.A. 17.

Proceedings Below

Armco brings this appeal with respect to the application of the West Virginia business and occupation tax to its sales of metal buildings to franchisees located in West Virginia and to its sales of steel and wire rope products shipped to customers located in West Virginia. For each of the years 1970 through 1975 Armco filed West Virginia business and occupation tax returns on which it reported and paid tax upon all coal production within the state and upon all sales by the Metal Products division (of construction and drainage products and metal buildings) to customers located within West Virginia. Armco did not report or pay tax upon its sales of steel or wire rope products shipped to customers in West Virginia.

Upon audit of those returns, the State Tax Commissioner took the position that sales of steel and wire rope products were subject to the tax and issued a Notice of Assessment of Tax against Armco for the period January 1, 1970, through December 31, 1975. Armco petitioned the State Tax Commissioner for reassessment of the Notice of Assessment of Tax, asking (i) that the additional assessment with respect to sales of steel and wire rope products be abated, and (ii) that tax paid with respect to its sales of metal buildings be refunded. An administrative hearing was conducted on May 23, 1977, and the State Tax Commissioner subsequently affirmed the assessment of tax with respect to all of Armco's wholesale sales of steel, wire rope and metal buildings to customers in West Virginia. *See* Appendix C, J.S. 37a.

Armco appealed the State Tax Commissioner's decision to the Circuit Court of Kanawha County. The Circuit Court reversed the State Tax Commissioner's administrative decision, holding that taxation of the sales at issue by West Virginia would violate the Commerce Clause and Due Process Clause of the Constitution because there was not a sufficient nexus between those sales and the State of West Virginia. *See* Appendix B, J.S. 25a.

The State Tax Commissioner in turn appealed the decision of the Circuit Court to the Supreme Court of Appeals of West Virginia, and the latter court reversed, holding that the nexus constitutionally required need not exist between the state and the specific activities subjected to the tax. It found what it deemed a sufficient nexus by viewing Armco as a "unitary business" and referring to its business activities in West Virginia other than activities relating to the sales being taxed. *See* Appendix A, J.S. 1a.

SUMMARY OF ARGUMENT

This appeal presents another chapter in the evolving resolution of the conflict between legitimate needs for state revenues and rights afforded under the Constitution. For two reasons the scales in this proceeding tip decisively in favor of the constitutional rights.

First, the required nexus is not present here. The Court below held that a state tax on gross receipts from concededly interstate transactions may be imposed without regard to the degree of nexus between those transactions and the taxing jurisdiction. That holding is contrary to prior decisions of this Court, *Norton Co. v. Dep't of Revenue of Illinois*, 340 U.S. 534 (1951), and misapplies the quite different nexus standards applicable to the collection of state use taxes, *National Geographic Soc'y v. California Bd. of Equalization*, 430 U.S. 551 (1977). In so doing, the Court below abandons the constitutional requirement that the tax be "applied to an activity with a substantial nexus with the taxing State." *Complete Auto Transit, Inc. v. Brady*, 430 U.S. 274, 279 (1977).

The rationale adopted by the Supreme Court of Appeals was that Armco operates a "unitary business . . . under one corporate umbrella" and that therefore the Court below was "not required to separate [the interstate sales in question] and treat them separately for purposes of determining whether in isolation they have a sufficient connection to this State to warrant the imposition of a business and occupation tax." J.S.

15a. This confirmed and expanded the view previously expressed by the Court below that it is not "necessary for there to be a nexus between the particular instate activities of the taxpayer and the activity sought to be taxed." *Western Maryland Ry. v. Hardesty*, 282 S.E.2d 240, 244 (1981). Armco's view is that application of the unitary business principle to find the nexus required for a non-apportioned gross receipts tax on interstate sales is wholly inappropriate.

The unitary business theory was born of the practical necessity of defining the total amount of a taxpayer's net income available for apportionment among various taxing jurisdictions. *Exxon Corp. v. Wisconsin Dep't of Revenue*, 447 U.S. 207 (1980). It is not designed and has never been applied for the purpose of establishing nexus or apportioning gross income or receipts to one state or another.

The mischief arising from application of the unitary business theory here is apparent when one considers that Armco's Metal Products division office and coal activities did not contribute in any way in generating the sales in question. Accordingly, this is not a case where a maze of local activities was linked in an economic sense to the sales being taxed. *See General Motors Corp. v. Washington*, 377 U.S. 436 (1964); *Standard Pressed Steel Co. v. Washington Dep't of Revenue*, 419 U.S. 560 (1975). What we are faced with, then, is a form of bootstrap taxation: first, the Metal Products division office and the coal operations, which pay their full share of West Virginia business and occupation taxes, are considered to create nexus with Armco as an entity; and second, that nexus with Armco is then cited as justification for collecting further taxes imposed upon the wholly unrelated sales at issue here. Armco submits that the nexus found in this manner by the Court below is fictitious and cannot support the gross receipts taxes at issue.

The second reason for concluding that West Virginia has gone too far here in a constitutional sense is that the exemption from the business and occupation tax on wholesale sales granted to West Virginia manufacturers discriminates against

interstate commerce. By its terms the West Virginia business and occupation tax is applied to sales of products manufactured outside West Virginia and is not applied to sales of products manufactured within the state. A clearer example of discrimination against interstate commerce would be difficult to imagine, and attempts to obscure this conclusion by reference to other taxes imposed on West Virginia manufacturers do not alter or justify this basic discrimination.

Three Justices of this Court concluded that the same statutory plan in Washington, "on its face, discriminated against interstate wholesale sales to Washington purchasers for it exempted the intrastate sales of locally made products while taxing the competing sales of interstate sellers." *General Motors v. Washington*, 377 U.S. at 459 (Goldberg, J., dissenting).[3] And the Supreme Court of Washington had earlier concluded that the Washington tax on interstate sales was invalid under the Commerce Clause. *See Columbia Steel Co. v. State*, 30 Wash. 2d 658, 192 P.2d 976 (1948).

Even if the West Virginia business and occupation tax on manufacturing were viewed as compensating for the exemption of local manufacturers from the tax on wholesale sales, that exemption would nonetheless cause the tax system to be intrinsically discriminatory against interstate commerce. This is because, if the identical system were imposed in another state, the aggregate tax burden borne by commerce between West Virginia and the second state would necessarily be greater than the burden on intrastate commerce in either of those states.

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3 Justices Stewart and White joined in this dissenting opinion. The tax toward which the quoted comment was directed had been amended prior to the years involved in *General Motors* and so was not at issue in that case.

ARGUMENT

Appellant begins in this appeal at the same point from which the Court below commenced:

> The Due Process Clause and the Commerce Clause of the Constitution of the United States contain standards that must be met in order to sustain state taxation of a business which conducts both local and interstate business.

J.S. 5a.

The Due Process Clause of the Fourteenth Amendment imposes two requirements for such state taxation: a "minimal connection" or "nexus" between the interstate activities and the taxing state, and "a rational relationship between the income attributed to the State and the intrastate values of the enterprise." *Exxon Corp. v. Wisconsin Dep't of Revenue*, 447 U.S. 207, 219-20 (1980); *Mobil Oil Corp. v. Comm'r of Taxes*, 445 U.S. 425, 436-37 (1980).

The Commerce Clause requires that the activity to which such taxation applies have a substantial nexus with the state and that the tax be fairly apportioned, not discriminate against interstate commerce, and be fairly related to the services provided by the state. *Complete Auto Transit, Inc. v. Brady*, 430 U.S. 274, 279 (1977).

A violation of any of these constitutional standards warrants invalidation of a state tax, and Appellant submits that the West Virginia tax on wholesale sales breaches two of them. As applied here it reaches transactions that do not have a substantial nexus with West Virginia, and it discriminates against interstate commerce.

I

THE SALES TAXED HEREIN DID NOT HAVE THE REQUIRED NEXUS WITH WEST VIRGINIA.

The first ground upon which the constitutional invalidity of the taxes involved here is asserted is that there was an insufficient nexus between the interstate sales taxed and the State of West Virginia. The territorial limitation on a state's taxing jurisdiction was expressed many years ago by Justice Holmes:

> The only reason for allowing a State to look beyond its borders when it taxes the property of foreign corporations is that it may get the true value of the things within it, when they are part of an organic system of wide extent, that gives them a value above what they otherwise would possess. The purpose is not to expose the heel of the system to a mortal dart—not, in other words, to open to taxation what is not within the State.

Wallace v. Hines, 253 U.S. 66, 69 (1920). Stated in more modern terms, the Due Process and Commerce Clauses require a nexus between a transaction subjected to tax and the taxing jurisdiction. *See Complete Auto Transit, Inc. v. Brady*, 430 U.S. 274 (1977); *General Motors Corp. v. Washington*, 377 U.S. 436 (1964); *Wisconsin v. J.C. Penney Co.*, 311 U.S. 435 (1940). The nexus requirement established by these cases represents the primary means by which this Court has consistently denied to the states any right of extraterritorial taxation. *Norfolk & Western Ry. v. Tax Comm'n*, 390 U.S. 317 (1968); *Wallace v. Hines*, 253 U.S. 66 (1920). The guiding principle is that: "Under both the Due Process and the Commerce Clauses of the Constitution, a state may not . . . 'tax value earned outside its borders.' " *Container Corp. of America v. Franchise Tax Bd.*, 103 S. Ct. 2933, 2939 (1983) (quoting *ASARCO Inc. v. Idaho State Tax Comm'r*, 458 U.S. 307, 315 (1982)). This principle is confirmed in *Mobil Oil Corp. v. Comm'r of Taxes*, 445 U.S. 425, 442 (1980), where this Court indicated its

unwillingness to condone the taxation of "extraterritorial values", and in *F.W. Woolworth Co. v. Taxation & Revenue Dep't*, 458 U.S. 354, 372 (1982), where the state's claim for tax was denied on the ground that it was "attempting to reach 'extraterritorial values'."

In appraising whether the West Virginia taxes imposed upon Armco's sales here can survive constitutional scrutiny, it is important to bear in mind that these taxes are not merely collected by the out-of-state seller, as in the case of some use taxes, but are borne by the seller. Also important is the fact that these taxes are imposed upon gross receipts rather than on net income. The nexus problems presented by taxes upon gross receipts are particularly acute:

> A tax upon gross receipts affects each transaction in proportion to its magnitude and irrespective of whether it is profitable or otherwise. Conceivably it may be sufficient to make the difference between profit and loss, or to so diminish the profit as to impede or discourage the conduct of the commerce. A tax upon the net profits has not the same deterrent effect, since it does not arise at all unless a gain is shown over and above expenses and losses, and the tax cannot be heavy unless the profits are large.

United States Glue Co. v. Town of Oak Creek, 247 U.S. 321, 329 (1918). *See also General Motors Corp. v. Washington*, 377 U.S. at 440; *Standard Pressed Steel Co. v. Washington Dep't of Revenue*, 419 U.S. 560, 563 (1975).

The discussion which follows concludes (i) that the nexus between the Armco sales subjected to West Virginia tax and the State of West Virginia was insufficient to permit taxation under the Constitution, and (ii) that the unitary business concept should not be applied to create the required nexus.

A. TRANSACTIONAL NEXUS RULES PRECLUDE TAXATION OF THE SALES IN QUESTION.

At the heart of the controversy here is *Norton Co. v. Dep't of Revenue of Illinois*, 340 U.S. 534 (1951), which held that for gross receipts taxes the nexus test is whether "particular transactions are dissociated from the local business." 340 U.S. at 537. *Norton* involved a Massachusetts manufacturer selling its products in Illinois. The taxpayer maintained a branch office in Illinois with an inventory of frequently purchased items, and Illinois sought to impose its gross receipts tax on all of the taxpayer's sales to Illinois customers. This Court sustained the tax on sales made by the Illinois office and on sales in which the Illinois office acted as intermediary, either receiving orders to be forwarded to Massachusetts or receiving goods in bulk from Massachusetts for reconsignment to separate customers. The *Norton* opinion stated:

> [T]he judgment attributing to the Chicago branch income from all sales that utilized it either in receiving the orders or distributing the goods was within the realm of permissible judgment. Petitioner has not established that such services as were rendered by the Chicago office were not decisive factors in establishing and holding this market.

340 U.S. at 538. However, this Court refused to allow the gross receipts tax to be imposed on sales pursuant to orders sent directly by Illinois customers to Massachusetts and filled by direct shipment from Massachusetts to the Illinois customers, stating that "the State could not reasonably attribute their proceeds to the local business." 340 U.S. at 539.

Armco's local businesses in West Virginia consisted solely of its coal activities and the selling of construction and drainage products. Nowhere in the record of this proceeding, or in the opinion of the Court below, is there the slightest indication that the sales in question were anything other than "dissociated" from those local business activities in West Virginia. On the contrary, the Circuit Court in West Virginia found that

Armco "has met its burden of showing that no local presence contributes to the interstate business." J.S. 28a.

The Court below did not quarrel with the Circuit Court's conclusion that Armco's sales of steel, wire rope and metal buildings to customers in West Virginia were dissociated in the *Norton* sense from Armco's local business activities in the state. Rather, it relied in large measure upon what it took to be the "weakening" of this Court's *Norton* decision by the later decisions in *General Motors*, 377 U.S. 436, and *Standard Pressed Steel*, 419 U.S. 560. Armco submits that these later decisions, rather than weakening *Norton*, confirmed the basic dissociation rule and refined its application.

At issue in *General Motors* was the applicability of a Washington tax to the gross receipts from the interstate sales by various divisions of the taxpayer of cars and related products to dealers in Washington. This Court expressly recognized the validity of the *Norton* dissociation test by stating that in order to avoid the Washington business and occupation tax on gross receipts the corporation "has the burden of showing that the operations of these divisions in the State are 'dissociated from the local business and interstate in nature.' " 377 U.S. at 441. This Court examined the activities of each division of the taxpayer and sustained the tax on direct out-of-state shipments of cars, parts and accessories to dealers within the state only because those sales were so intertwined with the "maze of local connections" as to be incapable of being "dissociated from the local business." 377 U.S. at 448. Thus, *General Motors* is a direct application of *Norton*. Moreover, less than a year later, in *American Oil Co. v. Neill*, 380 U.S. 451 (1965), this Court confirmed its commitment to the *Norton* dissociation test.

The appropriate test was explained by the opinion in *General Motors* in the following terms:

> Where, as in the instant case, the taxing State is not the domiciliary State, we look to the taxpayer's business activities within the State, *i.e.*, the local incidents, to

> determine if the gross receipts from sales therein may be fairly related to those activities.

377 U.S. at 441.

The "dissociation" test under *Norton* and the "fairly related" *General Motors* standard are two sides of the same coin. The tax in *General Motors* was upheld under the *Norton* test because the local business activities of the taxpayer in Washington contributed to and in fact generated the sales being taxed. Dissociation simply did not exist because the sales in question were fairly related to the taxpayer's local business activities. The teaching of *General Motors* relevant to this appeal is apparent from the fact that Armco's local business activities in West Virginia cannot be fairly related to, and in fact had nothing at all to do with, the interstate sales which West Virginia seeks to tax.

The same analysis applies to *Standard Pressed Steel*. There a single product was sold by a Pennsylvania manufacturer to a single customer in Washington, but those sales were found to have been largely generated by the local business of the manufacturer in Washington carried on by a full-time resident employee. This Court reacted to the assertion that the gross receipts from these sales could not be taxed by Washington with some vigor:

> We think the question in the context of the present case verges on the frivolous. For appellant's employee, Martinson, with a full time job within the State, made possible the realization and continuance of valuable contractual relations between appellant and Boeing [the customer].

419 U.S. at 562.

There is no room here for the conclusion that Armco's coal mining activities or its Metal Products division sales office in any way "made possible the realization" of the sales which West Virginia asserts the right to tax. Nor did those activities contribute in any way to the "continuance of valuable contrac-

tual relations" between Armco and its West Virginia customers for steel, wire rope and metal buildings. Accordingly, its sales of those products were dissociated from Armco's local business activities in West Virginia and cannot be taxed by West Virginia under *Norton*.

The conclusion of the Court below that *Norton* is not controlling here because it has been weakened by *General Motors* and *Standard Pressed Steel* is not well taken. Those later cases are examples of situations where, under the *Norton* dissociation test, the interstate sales in question were generated by and so were fairly related to, rather than dissociated from, the taxpayers' local business activities. So viewed, the three decisions in *Norton*, *General Motors* and *Standard Pressed Steel* are entirely consistent and they compel the conclusion that the Armco sales at issue here were dissociated from its local business conducted in West Virginia. Accordingly, the required nexus is absent, and these sales cannot be taxed by West Virginia.

Having rejected *Norton*, the Court below, quoting from its prior decision in *Western Maryland Ry. v. Hardesty*, 282 S.E.2d 240 (1981), found that there was no need for any "nexus between the particular in-state activities of the taxpayer and the activities sought to be taxed." J.S. 14a (quoting 282 S.E.2d at 244). In reaching this conclusion the Court below relied upon the decision of this Court in *National Geographic Soc'y v. California Bd. of Equalization*, 430 U.S. 551 (1977). *National Geographic*, however, involved the attenuated nexus appropriate where an out-of-state seller is merely being asked to perform the administrative function of collecting a state use tax imposed on another taxpayer. What the Court below failed to take into account was that *National Geographic* cited *Norton* with approval and carefully distinguished situations involving gross receipts taxes:

> However fatal to a direct tax a "showing that particular transactions are dissociated from the local business . . . ," *Norton Co. v. Illinois Rev. Dept.*, *supra*, at 537;

> *American Oil Co. v. Neill, supra*; *Connecticut Gen. Life Ins. Co. v. Johnson*, 303 U.S. 77 (1938), such dissociation does not bar the imposition of the use-tax-collection duty.

430 U.S. at 560 (footnote omitted).

B. THE UNITARY BUSINESS CONCEPT SHOULD NOT BE APPLIED TO CREATE THE REQUIRED NEXUS.

Even though the Court below found *Norton* no longer controlling, it did not reverse the Circuit Court on the ground that it had been wrong in concluding that there was not a sufficient nexus between the transactions subject to tax and the State of West Virginia. Apparently the Court below agreed with that assessment based on traditional nexus standards. Rather, it turned to the unitary business concept to reverse the Circuit Court and support the gross receipts taxes on Armco's sales.

The unitary business principle was described in *Container Corp. of America v. Franchise Tax Bd.*, 103 S. Ct. 2933 (1983), as follows:

> The unitary business/formula apportionment method is a very different approach to the problem of taxing businesses operating in more than one jurisdiction. It rejects geographical or transactional accounting, and instead calculates the local tax base by first defining the scope of the "unitary business" of which the taxed enterprise's activities in the taxing jurisdiction form one part, and then apportioning the total income of that "unitary business" between the taxing jurisdiction and the rest of the world on the basis of a formula taking into account objective measures of the corporation's activities within and without the jurisdiction.

103 S. Ct. at 2940.

The unitary business principle is reconcilable with the constitutional prohibition against state taxation of extraterritorial values only by reason of factors peculiar to net income taxes.

The impossibility of allocating a taxpayer's total net income directly among two or more states led to the practice of defining total net income realized by the taxpayer's unitary business and then apportioning that total net income among the states by formulae. No such difficulty is presented by a non-apportioned gross receipts tax such as the West Virginia tax imposed on Armco.

This Court has long recognized that net income was a considerable step removed from the transactions in interstate commerce in which it was earned. *United States Glue Co. v. Town of Oak Creek*, 247 U.S. 321 (1918), approved application of an apportioned net income tax to a corporation's entire net income, including the segment derived from the purchase and sale of goods wholly outside the state. The Court drew the analogy to "ordinary property taxes upon property having a situs within its territory and employed in interstate commerce" which had been previously upheld, 247 U.S. at 327, and described the net income tax as "affecting only the net receipts from exportation after all expenses were paid and losses adjusted and the recipient of the income was free to use it as he chose." 247 U.S. at 328.

Drawing a similar distinction between taxation of net profits and taxation of the interstate activities from which they arose, two years later in *Underwood Typewriter Co. v. Chamberlain*, 254 U.S. 113 (1920), this Court emphasized the indivisibility of net earnings as justifying formula apportionment against the contention that the tax was imposed on income arising from business conducted beyond the boundaries of the state:

> The profits of the corporation were largely earned by a series of transactions beginning with manufacture in Connecticut and ending with sale in other States. . . . The legislature in attempting to put upon this business its fair share of the burden of taxation was faced with the impossibility of allocating specifically the profits earned by the processes conducted within its borders. It, therefore, adopted a method of apportionment which, for all

> that appears in this record, reached, and was meant to reach, only the profits earned within the State.

254 U.S. at 120-21.

The decision in *Underwood* was considered controlling in *Bass, Ratcliff & Gretton Ltd. v. State Tax Comm'n*, 266 U.S. 271 (1924), in which a series of transactions in different jurisdictions resulting in net income was equated to Justice Holmes' "organic system of wide extent" to which a state might look "to get the true value of the things within it" and was characterized as a "unitary business." 266 U.S. at 282.

From the outset, therefore, the unitary business principle was the result of this Court's recognition of the facts that (i) net income is a subject of taxation distinct from, albeit in the aggregate attributable to, activities in multiple states, and (ii) separable activities comprising a single "organic system" produce net income which is impossible to allocate to the separate activities or to the jurisdictions in which the activities occurred (other than by formula apportionment). These considerations remain today the sole justification for the unitary business principle. *See ASARCO Inc. v. Idaho State Tax Comm'r*, 458 U.S. 307 (1982); *Container Corp. of America v. Franchise Tax Bd.*, 103 S. Ct. 2933 (1983).

It is critical to note that the impossibility of making a logical division of the net income of a single organic system is absent in the case of gross receipts taxes. Expenses are irrelevant in computation of the tax and, in fact, a gross receipts tax is imposed even if a sale is made at a net loss. Here, while asserting the unitary business principle in order to use Armco's local business activities as justification for taxing Armco's sales of steel, wire rope and metal buildings, West Virginia itself separates receipts from mining activities and wholesaling, subjecting them to gross receipts taxes at different rates.

The unitary business principle does not define which activities are sufficiently connected to a state to be subject to its taxing jurisdiction. It merely defines the outer limits of what a

state may include in the net income base to which formula apportionment may be applied to determine the net income earned within and taxable by the state. Approving rejection of the *Norton* dissociation test by the Court below, and its substitution of a theory of borrowed nexus based upon the unitary business principle, would vastly expand the states' powers of taxation.

Here West Virginia has asserted tax only on receipts from shipments to customers in West Virginia. If the *Norton* transactional nexus is not required, there would appear to be no constitutional barrier to West Virginia asserting tax on all gross receipts of all unitary businesses some aspect of which is carried on in West Virginia, regardless of the destination of shipments from which the receipts arise. While such a result might seem beyond all reason, it would be the quite logical result of the application of the unitary business theory. As Justice McHugh of the West Virginia Supreme Court of Appeals stated in his dissent in *Cincinnati Milacron Co. v. Hardesty*:

> This case is another in the steadily increasing number of cases in West Virginia imposing the business and occupation tax on an out-of-state taxpayer. . . . [T]he result in the case now before this Court illustrates the extreme circumstances on which this Court will seize to impose a business and occupation tax on an out-of-state taxpayer.
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> • • •
>
> There has been a steady erosion in the nexus required. An example of the rapacious designs of the state authorities appears in the tax commissioner's brief where the following words are written: "Nexus is automatically met by presence in West Virginia." That doctrine is uncomplicated and simple to apply. I fear that this Court is being lured into that greedy embrace.

290 S.E.2d 902, 904-05 (1982) (McHugh, J., dissenting).

This is not to suggest that the gross receipts taxes sought to be imposed here by West Virginia are rapacious or rise to the

level of a greedy embrace. It is submitted, however, that the application of the unitary business principle to create a sufficient nexus to support those taxes under the Constitution is a misuse of that principle which should not be permitted.

II

THE WEST VIRGINIA TAX ON WHOLESALERS DISCRIMINATES AGAINST INTERSTATE COMMERCE.

From more than a century of Commerce Clause jurisprudence in this Court has emerged the fundamental principle that the Commerce Clause prohibits a state from imposing a tax which discriminates against interstate commerce by providing a direct commercial advantage to local business. *See Boston Stock Exchange v. State Tax Comm'n*, 429 U.S. 318, 328-29 (1977); *Halliburton Oil Well Co. v. Reily*, 373 U.S. 64, 72 (1963); *Northwestern States Portland Cement Co. v. Minnesota*, 358 U.S. 450, 457 (1959); *Nippert v. Richmond*, 327 U.S. 416 (1946); *I.M. Darnell & Son v. Memphis*, 208 U.S. 113, 119-20 (1908); *Walling v. Michigan*, 116 U.S. 446, 455 (1886); *Guy v. Baltimore*, 100 U.S. 434, 443 (1880); *Welton v. Missouri*, 91 U.S. 275 (1876). The concern underlying this prohibition is that permitting the individual states to enact laws favoring local enterprises at the expense of out-of-state businesses would encourage the creation of preferential local trade areas destructive of the free flow of trade envisioned by the Commerce Clause. *Boston Stock Exchange v. State Tax Comm'n*, 429 U.S. at 329. *See Dean Milk Co. v. Madison*, 340 U.S. 349, 356 (1951).

The issue addressed here is whether the business and occupation tax under review creates precisely such a preferential trade zone in West Virginia. For the reasons noted below, the tax in fact does function to create such a zone both (i) by its operation independent of other taxing jurisdictions, and (ii) by its operation in a multi-jurisdiction context.

A. THE TAX IS DISCRIMINATORY WHEN VIEWED IN ISOLATION FROM OTHER JURISDICTIONS.

We begin with the terms of the statute. West Virginia imposes its business and occupation tax upon all persons engaging or continuing within the state in selling at wholesale tangible property, but exempts from the tax wholesale sales by manufacturers of products manufactured within the state. The result is that such sales by manufacturers to West Virginia customers are taxed only if the product sold was manufactured outside West Virginia. This exemption causes the West Virginia business and occupation tax, on its face, to discriminate against interstate commerce.

Faced with the clearly discriminatory nature of the West Virginia tax on wholesale sales, the Supreme Court of Appeals noted first that the exemption from the tax on wholesale sales is available to out-of-state corporations which manufacture products in West Virginia. The thought here seems to be that there would be no discrimination against interstate commerce if only the taxpayer would cease engaging in interstate commerce and manufacture its products in West Virginia. This approach not only mistakenly equates the avoidance of interstate commerce with nondiscrimination, it also would tend to induce manufacturers to locate within West Virginia to obtain the tax exemption, thus promoting a preferential local trade zone of a type the Commerce Clause was designed to avoid.

The Supreme Court of Appeals then turned for comfort to the doctrine that a state tax should be assessed in light of its actual effect when considered in conjunction with other provisions of the state's tax statutes. *Maryland v. Louisiana*, 451 U.S. 725, 756 (1981); *Halliburton Oil Well Co. v. Reily*, 373 U.S. at 69; *Gregg Dyeing Co. v. Query*, 286 U.S. 472, 479-80 (1932). The other provision of the West Virginia statute which the Court below concluded should be considered in conjunction with the tax on wholesale sales is the business and occupation tax imposed upon manufacturers in West Virginia. After noting that the tax on manufacturing is imposed at a rate

higher than the rate of tax imposed upon wholesale sales, the Court concluded that an out-of-state manufacturer cannot be heard to complain that it is subject to a tax from which West Virginia manufacturers are exempt, because the out-of-state manufacturer is not subject to the even higher tax on manufacturing which the West Virginia manufacturer pays. That analysis fails to come to grips with the discrimination involved.

While it is no doubt true that West Virginia manufacturers pay a variety of state and local taxes in West Virginia to which out-of-state manufacturers are not subject, the existence of those taxes does not license West Virginia to discriminate against interstate commerce in imposing its tax on wholesale sales in West Virginia. The West Virginia tax on manufacturing cannot justify the local-manufacturer exemption from the tax on wholesale sales because the incident of taxation in one case (manufacturing) is wholly unrelated to that in the other (selling).

The opinion under review suggests that some portion of the higher tax on manufacturing in West Virginia should be considered a substitute for the tax on wholesale sales and that, so viewed, there is no discrimination.

> It requires no great feat of imagination to conclude that the Legislature in placing the business and occupation tax on manufacturing at eighty-eight one hundredths of one percent realized that a manufacturer would also have to dispose of the product either through wholesale or retail sales and that it would be unfair to impose an additional tax on this transaction. Therefore, it created the exemption found in W. Va. Code, 11-13-2.

J.S. 22a-23a. The West Virginia tax on manufacturers, however, is imposed without regard to what disposition is made of their products, with the result that the full tax applies to products which would not be subject to the tax on wholesale sales even if there were no exemption for local manufacturers. For example, no alternative rate, compensating deduction or partial exemption is provided with respect to the manufac-

turer's tax where the taxpayer either (i) uses the product in its own business or (ii) sells the product outside West Virginia.[4] In either event, there is no abatement of the manufacturer's tax.

Moreover, if the speculation of the Court below were correct, an exemption for local manufacturers from the tax on retail sales also would have been provided. No such exemption exists, however. The exemption discussed herein applies only to wholesale sales and a local manufacturer is required to pay the tax on selling for all sales at retail. *See* J.S. 59a-60a. Accordingly, no portion of the manufacturer's tax can be considered to be a substitute for a tax on sales, and products manufactured within the state are thus impermissibly favored in sales transactions within the state.

At one time, the State of Washington employed a gross receipts tax virtually identical except for rates to the one challenged here. The Supreme Court of Washington held that the Washington statute, by exempting local manufacturers from the tax on wholesale sales, violated the Commerce Clause because the exemption placed interstate commerce at a disadvantage in competition with local commerce:

> In our opinion the statute marks a discrimination against interstate commerce in levying a tax upon wholesale activities of those engaged in interstate commerce, which tax is, because of the exemption contained in § 8370-6, not levied upon those who perform the same taxable act, but who manufacture in the state of Washington. The statute is therefore violative of the commerce clause of the Federal constitution, and is invalid.

Columbia Steel Co. v. State, 30 Wash. 2d 658, 664, 192 P.2d 976, 979 (1948).

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4 The tax on sales could not apply in either event because the statute requires both that there be a sale and that it be within the state. Moreover, a clear line of decisions of this Court holds that a state may not impose a non-apportioned gross receipts tax with respect to sales in another state. *See Evco v. Jones*, 409 U.S. 91 (1972), and cases cited therein.

After the decision in *Columbia Steel*, the Washington statute was amended in 1950 to impose the gross receipts tax on wholesale sales by both in-state and out-of-state manufacturers. The Supreme Court of Washington's response to that amendment emphasized that the critical distinctions between the previously rejected scheme and its acceptable successor were the elimination of the exemption for local manufacturers from the tax on sales and the shift from manufacturing to selling as the taxable incident for local manufacturers. This change, the Court stated, placed all manufacturers on equal footing with regard to the taxation of their sales:

> All those who sell at wholesale within this state are now taxed equally upon that activity regardless of whether they manufacture in Washington or elsewhere. . . . Each state must derive its revenues from what goes on within its own borders. And if Washington's statute exempts local manufacturers from paying their tax as manufacturers, providing they also pay it as sellers, that, as appellant admits, can be of no concern to one who manufactures out of the state. Appellant engages in but one local taxable activity—selling—and as to this it is now taxed on a parity with all others who engage in like activity here.

B.F. Goodrich Co. v. State, 38 Wash. 2d 663, 668-69, 231 P.2d 325, 328 (1951).

As noted previously, looking back some 14 years later three Justices of this Court agreed that the original Washington exemption for local manufacturers had violated the Commerce Clause:

> Prior to its amendment in 1950 the exemptive terms of this "multiple activities" provision were designed so that a Washington manufacturer-wholesaler would pay the manufacturing tax and be exempt from the wholesale tax. This provision, on its face, discriminated against interstate wholesale sales to Washington purchasers for it exempted the intrastate sales of locally made products while taxing the competing sales of interstate sellers.

General Motors v. Washington, 377 U.S. 436, 459 (1964) (Goldberg, J., dissenting).

The Court below observed briefly in a footnote that the Supreme Court of Washington had invalidated a "rather similar business and occupation tax provision" in *Columbia Steel*, but mistakenly believed that the subsequently decided *Alaska v. Arctic Maid*, 366 U.S. 199 (1961), controlled. J.S. 21a-22a. In *Arctic Maid*, a claim was made that a four-percent tax imposed by Alaska on the value of fish acquired by freezer ships from Alaskan waters for freezing and canning in interstate commerce was invalid. The taxpayer complained that this tax discriminated in favor of local fish processors who paid a one-percent tax on fish they caught and sold to the fresh-frozen consumer market. This Court held that the Alaskan tax structure did not discriminate because freezer ships did not compete with those who processed fish for the retail market, thus negating any charge of local competitive advantage. Concluding that the freezer ships and local processors were engaged in entirely different businesses, this Court reiterated the absence of any "iron rule of equality" between taxes laid on different types of businesses.

The reliance of the Court below on *Arctic Maid* was misplaced because the local favoritism in the West Virginia tax structure does not benefit only those who are engaged in different businesses than Armco. Rather, the West Virginia system confers an advantage on any local manufacturer who competes directly in the same type of business with Armco. Accordingly, *Arctic Maid* is simply not in point.[5]

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5 Also not in point here are two other cases relied upon by Appellee in the Motion to Dismiss or Affirm filed in this proceeding. *Caskey Baking Co. v. Virginia*, 313 U.S. 117 (1941), and *Gregg Dyeing Co. v. Query*, 286 U.S. 472 (1932). In *Caskey Baking* this Court found that the taxpayers involved (peddlers and manufacturers) were, like the taxpayers in *Arctic Maid*, engaged in entirely different businesses. 313 U.S. at 120-21. In *Gregg Dyeing*, a system of sales and compensating use taxes was imposed at identical rates on all gasoline sold or stored for consumption within the state; in contradistinction to this appeal, the object of the tax was made clear by the fact that locally refined gasoline shipped to other states was not taxed. 286 U.S. at 475-76.

B. THE TAX IS DISCRIMINATORY WHEN VIEWED IN CONJUNCTION WITH OTHER JURISDICTIONS.

Even if the West Virginia business and occupation tax on manufacturing is deemed to compensate for the exemption of local manufacturers from the tax on wholesale sales, that exemption nevertheless causes the West Virginia tax system to be intrinsically discriminatory against interstate commerce because, when subjected to the identical system in more than one state, interstate commerce between those states will bear a greater tax burden than intrastate commerce.

For example, if Ohio imposed a business and occupation tax identical to that of West Virginia, the activities of manufacturing and wholesaling goods, when both were performed in either one of the two states (*i.e.*, wholly intrastate commerce), would subject the taxpayer to tax on the manufacturing activity, but not on the wholesaling activity. The taxpayer who manufactured identical goods in one of the states and sold them at wholesale in the other, however, would incur liability both for the tax on the manufacturing activity in the first state (in the same amount as the intrastate taxpayer) and for tax on the sales in the second state. As a result, the interstate taxpayer would suffer a total business and occupation tax liability exceeding that imposed on the intrastate taxpayer by an amount equal to the tax on wholesale sales.

In the recent opinion in *Container Corp. of America v. Franchise Tax Bd.*, 103 S. Ct. 2933 (1983), this Court pointed out that "in the interstate commerce context . . . the anti-discrimination principle has not in practice required much in addition to the requirement of fair apportionment." And the opinion also noted that the "first, and again obvious, component of fairness in an apportionment formula is what might be called internal consistency—that is ***the formula must be such that, if applied by every jurisdiction***, it would result" in fair apportionment. 103 S. Ct. at 2942, 2943 (emphasis supplied).

The standard of "internal consistency" contemplated by *Container Corp.* is not met here because, if every jurisdiction applied the West Virginia system, interstate commerce would

always be taxed more than intrastate commerce. Since the discrimination against sales in interstate commerce as described above is intrinsic to the West Virginia tax on wholesale sales, that tax cannot be validly imposed on sales by Armco of products manufactured outside West Virginia.

CONCLUSION

For the foregoing reasons, Appellant submits that the application of the West Virginia business and occupation tax to its sales of steel products, wire rope products and metal buildings was unconstitutional. Accordingly, the decision of the West Virginia Supreme Court of Appeals should be reversed.

Dated: January 26, 1984

Respectfully submitted,

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NO. 83-297

IN THE

Supreme Court Of The United States

OCTOBER TERM, 1983

ARMCO, INC.,

Appellant,

v.

DAVID C. HARDESTY, JR.
State Tax Commissioner of West Virginia

Appellee

ON APPEAL FROM THE
SUPREME COURT OF APPEALS
OF WEST VIRGINIA

APPELLEE'S BRIEF ON THE MERITS

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QUESTIONS PRESENTED

The appellee respectfully disagrees with the appellant's presentation of the questions raised by the appeal and feels the following more fairly repesents the questions presented for review:

1. Whether sufficient nexus exists with regard to appellant's sales to West Virginia customers to allow West Virginia, consistent with Due Process Clause and Commerce Clause requirements, to impose its business and occupation privilege tax on appellant's in-State selling activities.

2. Whether the principles of the unitary business concept are appropriate in determining whether a corporation has entered a state in such a fashion that

nexus with regard to any one of its activities may be determined based upon its overall in-state operations.

3. Whether the imposition of the West Virginia business and occupation tax upon appellant's business activity of making wholesale sales in West Virginia discriminates against interstate commerce.

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IN THE
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State Tax Commissioner of West Virginia

Appellee.

ON APPEAL FROM THE
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APPELLEE'S BRIEF ON THE MERITS

STATEMENT OF THE CASE

Armco, Inc., is an Ohio corporation qualified to hold property and do business as a foreign corporation in the

State of West Virginia (J.A. 20). During the period in question, January 1, 1970, through December 31, 1975, Armco carried on extensive business activities in West Virginia resulting in its payment of tax under the following business and occupation tax classifications: coal production (Chapter 11, Article 13, Section 2a, of the West Virginia Code of 1931, as amended); retail sales (Code 11-13-2c); wholesale sales (Code 11-13-2c); contracting (Code 11-13-2c); and furnishing property for hire (Code 11-13-2i). (R. Transcript-State's Exhibit No. 3.) Armco acknowledged its in-State presence and taxability in the above areas but objected to the imposition of tax on wholesale sales made to West Virginia customers by certain of its internal divisions. Armco contended that the operations of those divisions when viewed separately from its

total in-State business did not have sufficient nexus with West Virginia.

Armco divides its organization into operating groups or divisions. Among those groups, separate manufacturing divisions are responsible for the marketing and sale of that division's products. Three manufacturing divisions made the wholesale sales at issue to West Virginia customers during the period involved. (J.A. 16.) The divisions are: Steel Group; Union Wire Rope; and Metal Products.

The Steel Group manufactures practically all steel mill products with emphasis on high quality steels for specific needs. (J.A. 16.) None of the Steel Group's manufacturing facilities are located in West Virginia. (J.A. 16.) The Steel Group has district sales offices in

Cincinnati, Ohio, and Pittsburgh, Pennsylvania, that have responsibility for territories which include portions of West Virginia. During the audit period appellant's Steel Group Division employed four salesmen who solicited business within West Virginia. Such salesmen entered this State as often as twice a month to consult with clients concerning products available from appellant and possible future needs. (J.A. 18-19.) Though not normal business procedure, such salesmen at times received orders from in-State customers on behalf of Armco. (J.A. 20.) After a customer's order was filled, Armco's sales representatives made follow-up calls to check customer satisfaction with the quality of the products sold and to solicit future orders. (J.A. 21.) In addition, occasionally representatives of the Steel

Group were called upon to investigate client complaints and perform service work within West Virginia. (J.A. 17.)

The Union Wire Rope Division produces wire rope slings and accessories at its mill facilities in Kansas City. (J.A. 16.) Wire Rope has three salesmen having responsibilities in West Virginia. Those salesmen are associated with Wire Rope's offices in Ashland, Kentucky, Pittsburgh, Pennsylvania, and Greensboro, North Carolina, and made one or two trips a month to West Virginia to consult with customers. (J.A. 19.)

The Metal Products Division produces and sells construction products, corrugated metal pipe, retaining wall, guard rail, plastic sewer pipe, floodgates, buildings, and so forth. (J.A. 16.) Said division maintains office facilities

at South Charleston, West Virginia, from which its employees solicit sales from customers throughout West Virginia. (J.A. 23.) The South Charleston office has responsibility for selling all of the Metal Products Division's products except metal buildings. (J.A. 24.) Armco created a separate department within the Metal Products Division through which the sale of metal buildings are handled in cooperation with franchise agents. (J.A. 24.) The franchise agents are West Virginia residents operating businesses in this State. (J.A. 27-28.) Armco allows said agents to whom it makes wholesale sales to display its corporate name and trademark at their place of business and in advertisements. Additionally, Armco shares advertising expenses with its agents to promote sales to ultimate customers.

All sales by any of Armco's divisions are subject to acceptance at Armco's home office at Middletown, Ohio. (J.A. 20.) Goods are generally shipped to West Virginia customers by common carrier, truck or rail. (J.A. 20.) Title to such goods under Armco's conditions of sale passes to the customer upon delivery to the carrier at the point of shipment. (J.A. 22.)

Assessment was made against Armco in 1977 for business and occupation taxes for the years 1970 through 1975 based on its total wholesale sales made to West Virginia customers. Such assessment was affirmed, less penalty, by the West Virginia State Tax Commissioner in his administrative decision issued December 10, 1977. Armco appealed the Tax Commissioner's administrative decision to the

Circuit Court of Kanawha County where the decision was overruled and the assessment vacated.

The Kanawha County Circuit Court found there was insufficient nexus to support the business and occupation tax assessed. Such decision was based upon the court's finding that Armco's in-State selling activities did not constitute a substantial enough nexus. The Court further held that the nexus required must be between the state and the activity or transaction in question and not merely between the state and other business activities of the taxpayer.

The West Virginia State Tax Commissioner appealed the Kanawha County Circuit Court's decision to the Supreme Court of West Virginia. In an opinion issued May 25, 1983, the West Virginia

Supreme Court reversed the Circuit Court and found there was sufficient nexus to support the taxation of the sales at issue. Such decision was based upon the Court's finding that Armco was a unitary business corporation conducting its business activity under one corporate umbrella. As a unitary business the Court concluded that the question of nexus must be resolved by examination of the full scope of Armco's in-State business operations and not by separate inquiry into each of its transactions.

SUMMARY OF ARGUMENT

The primary issue in this appeal involves the proper interpretation and application of constitutional nexus requirements in adjudging the validity of West Virginia's direct taxation of appellant's interstate selling activities.

Constitutional nexus considerations relate to both Due Process Clause and Commerce Clause requirements.

The Due Process Clause nexus restriction holds that a state may levy a tax on interstate business if there is a "minimal connection" between the taxing state and the income producing activities. Moorman Mfg. Co. v. Bair, 437 U.S. 267 (1968). The requisite minimal connection has been defined as a definite link between a state and the person, property or transaction it seeks to tax. National Bellas Hess Inc. v. Department of Revenue, 386 U.S. 753 (1967).

Preceding this Court's decision in Complete Auto Transit, Inc. v. Brady, 430 U.S. 274 (1977), states could not directly tax the privilege of conducting interstate business. A state could indirectly

tax an interstate activity only when there was an associated intrastate business which could serve as the incidence of the tax. The taxpayer's interstate business was the subject of the tax, but a portion of the taxpayer's interstate receipts could be included in the measure of the tax when the taxpayer's interstate and intrastate businesses were sufficiently related. Spector Motor Services, Inc. v. O'Connor, 340 U.S. 602 (1951). However, no portion of the interstate receipts could be attributed to the intrastate activity if the interstate business was shown to be disassociated from local business. Norton Co. v. Department of Revenue of the State of Illinois, 340 U.S. 534 (1951).

Due process nexus considerations at the time of Spector, and Norton, involved

an examination of the connection between a taxpayer's intrastate and interstate business. Interstate business could be indirectly taxed only when such interstate business was sufficiently associated with the taxpayer's local business. If a disassociation from intrastate business could be shown, the interstate activity lacked a minimal local connection with the taxing state and could not, consistent with due process requirements, be taxed.

Since interstate business activity is now subject to direct state taxation, there no longer has to be an associated intrastate activity upon which to base the tax. The circumstances Norton's disassociation test, supra, was designed to identify are no longer relevant, inasmuch as interstate business can now supply its own due process minimal connection. The

local aspects of an interstate business now permit its taxation regardless such business' disassociation from the taxpayer's intrastate business.

Due process nexus should be viewed as simply a threshold requirement used to determine whether there is any minimal connection which affords the state the jurisdiction to tax. In the instant case, the in-State presence of appellant's sales representatives, in furtherance of its sales to West Virginia customers, more than establishes the minimal connection necessary to satisfy due process nexus considerations.

Commerce Clause nexus requirements examine the sufficiency of the in-state portion of an interstate activity to determine whether a state may impose a tax on said interstate business. In

adjudging the sufficiency of the local activity, this Court has examined the in-state activity in relation to the incidence of the tax. When examining the propriety of taxes levied on the privilege of selling, this Court has consistently upheld the state tax when the in-state activity was substantial with relation to the establishment and maintenance of sales. General Motors Corp. v. Washington, 377 U.S. 436 (1964).

Appellant's in-State activities in this case involve solicitation activities by seven sales representatives. Such representatives were available to advise prospective customers of appellant's line of products and to make recommendations and provide advice concerning a customer's specific product needs. After a sale was consummated, the sales representatives made follow-up calls to check

customer satisfaction, investigate complaints and perform necessary service work. Appellant's in-State business activities, which are clearly essential to the establishment and maintenance of sales and make possible the continuance of valuable contractual relationships, are sufficient to satisfy Commerce Clause nexus requirements. See, Standard Pressed Steel Co. v. Department of Revenue of Washington, 419 U.S. 560 (1975).

The Commerce Clause nexus standard has also been viewed in terms of the tax bearing a fair relation to services provided by the taxing state. In the case of a unitary business, such as appellants, all aspects of such business contribute to all other aspects. Therefore, the nexus sufficient to tax any one aspect must be reviewed in terms of the total activities of the taxpayer within

the state. Only by considering a taxpayer's total activities can an accurate assessment be made of whether the taxpayer is being subject to the tax commensurate with the benefits it is receiving from the taxing state.

The West Virginia Supreme Court of Appeals' decision correctly utilizes the unitary concept when applying the Commerce Clause's nexus standard to appellant's disputed in-State selling activities. Appellant's West Virginia selling activities are clearly a part of its integrated business and as such should be viewed in conjunction with the full scope of its in-State operations to determine whether appellant is receiving State services and benefits which correspond with the amount of tax imposed upon its in-State activities. The appellee submits that the record plainly reveals that

appellant's State taxation is commensurate with its in-State activities.

The second issue in this appeal involves an alleged discrimination against interstate commerce by virtue of West Virginia's exemption from the payment of the State's wholesale sales business tax those sales of products previously taxed pursuant to the manufacturing privilege tax. Appellant contends that since an out-of-State manufacturer has to pay wholesale sales tax, while the in-State manufacturer does not, there is a discrimination against interstate commerce in violation of the Commerce Clause.

Appellee submits that the State's wholesale privilege tax system is not discriminatory when assessed in light of its actual effect considered in

conjunction with other provisions of the State's tax scheme. See, Maryland v. Louisiana, 451 U.S. 725 (1981). A West Virginia manufacturer is exempt from the wholesale sales tax, imposed at the rate of .27 percent, only if he has paid tax on manufacturing at the rate of .88 percent. When one considers the in-State manufacturer's tax burden is 300 percent greater than that of the out-of-State wholesaler, West Virginia's tax system cannot be said to discriminate against interstate commerce.

ARGUMENT

I.

WEST VIRGINIA'S TAXATION OF APPELLANT'S IN-STATE SELLING ACTIVITIES IS CONSISTENT WITH NEXUS REQUIREMENTS GOVERNING THE PERMISSIBLE TAXATION OF INTERSTATE BUSINESS.

A. INTRODUCTION

Chapter 11, Article 13, Section 2 and 2c, of the West Virginia Code of 1931, as amended, jointly levy a privilege tax on sellers of property and provide that the said business and occupation tax is to be imposed, "Upon every person engaging or continuing within this State in the business of selling any tangible property." (Emphasis supplied.) West Virginia's privilege tax levies on the business of selling and not on the sale itself. Therefore, appellant's persistent reference to West Virginia's taxation of out-of-State sales is misleading and inaccurate.

Appellee concedes that certain mechanical aspects of the sales at issue, such as the technical passage of title,

occur outside of West Virginia. However, appellee submits that such aspects have little bearing on where the business of selling occurs. There are numerous activities associated with the business of selling other than the passage of title. It is those business activities which surround the sale which form the subject of West Virginia's privilege tax and when such activities occur in-State, imposition of the tax is proper. Appellant's selling activities in West Virginia are a matter of record and clearly constitute engaging in the business of selling in the State.

Appellant in connection with the operation of its Steel and Union Wire Rope divisions made use of at least seven (7) sales representatives to systematically cover the entire State of West Virginia in search of prospective

clients. These representatives, while soliciting sales for the appellant, were available to advise prospective customers of appellant's line of products and to make recommendations and provide advice concerning a specific customer's product needs. For example, the Steel Group Division regularly made sales of customized products tailored to a customer's specific needs. (J.A. 16.) At times the sales representatives obtained orders on behalf of the appellant. (J.A. 20.) After a sale was consummated, the sales representatives made follow-up calls to check customer satisfaction, and in the event of customer complaints, appellant sent personnel in State to investigate such complaints and perform necessary service work. (J.A. 17, 21.) The sales at issue by appellant's Metal Products Division

were made to appellant's franchise agents. In accordance with the agreement of sale, the appellant allowed such agents to make use of its trademark and trade name to facilitate sales to ultimate customers. Appellant also participated in joint promotional activities with its franchisees.

Appellant's employment of salesmen in West Virginia whose sole function was the establishment and maintenance of the sales at issue clearly amounts to engaging in the business of selling within the State as contemplated by West Virginia's business and occupation tax laws. The sole inquiry presented to this Court is whether such business activities are sufficient to allow taxation consistent with constitutional nexus requirements. Nexus standards relate to both Due Process Clause and Commerce Clause requirements. Separate examination of the nexus

criterion relevant to each of those constitutional provisions will give this Court a clearer perception of the issue in this case.

B. DUE PROCESS CLAUSE CONSIDERATIONS

The first constitutional question in determining the propriety of a tax on interstate transactions is whether Due Process Clause requirements have been satisfied. In Commonwealth Edison Co. v. State of Montana, 453 U.S.609 (1981), this Court recognized that states have wide latitude in imposing revenue taxes like West Virginia's business and occupation tax. The Court noted that revenue taxes unlike "user" taxes were not imposed by the state for the use of state-owned or maintained facilities, and there was no due process requirement that taxes

collected from a particular activity must be reasonably related to the value of services provided to that activity. This Court then quoted the following general rule:

> "'Nothing is more familiar in taxation than the imposition of a tax upon a class or upon individuals who enjoy no direct benefit from its expenditure, and who are not responsible for the condition to be remedied.
>
> "'A tax is not an assessment of benefits. It is, as we have said, a means of distributing the burden of the cost of government. The only benefit to which the taxpayer is constitutionally entitled is that derived from his enjoyment of the privileges of living in an organized society, established and safeguarded by the devotion of taxes to public purposes. Any other view would preclude the levying of taxes except as they are used to compensate for the burden on those who pay them, and would involve abandonment of the most fundamental principle of government --that it exists primarily to provide for the common good.' Carmichael v. Southern Coal & Coke Co., 301 US 495, 521-523, 81 L

> Ed 1245, 57 S Ct 868, 109 ALR 1327 (1937) (citations and footnotes omitted)." 453 U.S. at 622.

The nexus requirement with regard to due process restrictions on a state's power to tax income generated by the activities of an interstate business, is set out in Moorman Mfg. Co. v. Bair, 437 U.S. 267 (1978) as follows:

> "First, no tax may be imposed unless there is some minimal connection between those activities and the taxing State. National Bellas Hess, Inc. v. Department of Revenue, 386 US at 753, 756, 18 L Ed2d 505, 87 S Ct 1389. * * * Id., 437 U.S. at 273.

The due process nexus restriction holds that a state may levy a tax on interstate business if there is a "minimal connection" between the state and the income producing activities. National Bellas Hess, Inc. v. Department of

Revenue, 386 U.S. 753 (1967) defined minimal connection as a definite link between a state and the person, property or transaction it seeks to tax.

In the instant case, West Virginia is taxing appellant's income earned from an interstate sale of products. Appellant's wholesale sales at issue were generated from in-State (West Virginia) contacts by its sales representatives. Such in-State presence of the person of the appellant, through its sales representatives, in furtherance of its business transactions more than establishes the minimal connection necessary to accord the State of West Virginia the right to levy its business and occupation tax.

The due process nexus standard clearly only requires that there be some

type of local incident upon which the state can base its jurisdiction to tax. In fact, in Mobil Oil Corp. v. Commissioner of Taxes of Vermont, 445 U.S. 425 (1980) this Court determined due process nexus requirements satisfied as follows:

> "The requisite 'nexus' is supplied if the corporation avails itself of the 'substantial privilege of carrying on business' within the state; and '(t)he fact that a tax is contingent upon events brought to pass without a state does not destroy the nexus between such a tax and transactions within a state for which the tax is an exaction.' Wisconsin v. J. C. Penney Co., 311 U. S. 433, 444-445 (1940)" Id.

Appellants' selling activities carried on in West Virginia supply the State the nexus to tax, and it is immaterial that certain aspects of the sales at issue occur outside the State.

One of the first cases dealing with the taxation of interstate commerce which considered due process nexus standards was Norton Co. v. Department of Revenue of the State of Illinois, 340 U.S. 534 (1951). In that case the State of Illinois attempted to indirectly tax interstate sales made by Norton Company to Illinois residents. Illinois sought to include in the measure of its intrastate privilege tax, receipts attributable to Norton's wholly interstate business. The Court determined that when such sales involved orders sent directly to Norton's out-of-state headquarters by the Illinois customer and shipped directly to the customer from said headquarters, there was no local incident upon which to base the tax. The Court further pointed out that even if the sales at issue resulted from in-State solicitation by Norton Co.

through sales representatives based outside Illinois, the nexus to tax would still be lacking. The Court stated:

> "Where a corporation chooses to stay at home in all respects except to send abroad advertising or drummers to solicit orders which are sent directly to the home office for acceptance, filling, and delivery back to the buyer, it is obvious that the State of the buyer has no local grip on the seller. Unless some local incident occurs sufficient to bring the transaction within its taxing power, the vendor is not taxable. McLeod v. Dilworth Co., 322 U.S. 327. Id. at 537.

Analysis of the Norton, decision supra, should begin by reviewing the scope of permissible state taxation of interstate commerce at the time Norton was decided. In 1951, Spector Motor Service, Inc. v. O'Connor, 340 U.S. 602 (1951) prohibited a state from directly taxing the privilege of conducting

interstate business. States could reach an interstate activity only when there was an intrastate business which could serve as the incidence of the tax. The state then could, within reasonable limits, compute the amount of tax by applying the tax rate to a fair proportion of the taxpayer's business done within the state, including both interstate and intrastate revenues. See, International Harvester Co. v. Evatt, 329 U.S. 416 (1947) and Interstate Pipe Line Co. v. Stone, 337 U.S. 662 (1949).

The general prohibition against the direct taxation of interstate commerce certainly was reflected in the Court's examination of due process nexus standards in Norton, supra. An interstate transaction could only be indirectly taxed by including of a portion of the interstate receipts in the measure of an

intrastate tax. If the interstate activity was disassociated from the taxpayer's intrastate business, due process prevented the state from including any interstate receipts in the measure of the local tax. Since a wholly interstate activity could not be subject to direct taxation, the in-state portion of that activity could not provide the minimal connection necessary to satisfy due process nexus requirements. The Court viewed an activity in interstate commerce as separated from local business. Therefore, an interstate activity by itself could never provide the nexus necessary to satisfy due process considerations.

The sales at issue in Norton, supra, originated from customer orders to Norton's out-of-state headquarters and were thus directly involved in interstate commerce. Such sales therefore had no local

incident upon which to base the tax. The Court's rationale was even more clearly apparent when it extended its holding to solicitation sales. Since a corporation's solicitation of orders via itinerant sales representatives was a purely interstate activity, the activities of those representatives in the taxing state could not be considered as supplying the local connection necessary to tax. Interstate business activities were accorded not only an immunity from direct state taxation but were shielded from a proper scrutiny of the local aspects of such activities.

This Court is well aware that Complete Auto Transit, Inc. v. Brady, 430 U.S. 274 (1977) eliminated the general prohibition against the direct taxation by a state of interstate commerce. Such decision established that a state may

directly tax the privilege of conducting interstate business under appropriate conditions. An interstate activity no longer need be associated with an intrastate business to be taxable.

In light of Complete Auto, supra, the appellee asserts that the Norton, decision, supra, must be reevaluated. Since purely interstate business activities may now be subject to state tax, the local aspects of such business must be examined to determine whether due process nexus requirements have been satisfied. The disassociation test of Norton must be restructured to conform with current principles of state taxation.

Norton held that activities may not be taxed consistent with due process if such activities are disassociated from local business and interstate in nature.

The appellee submits that such principle is only valid today when restricted to an examination of whether the interstate activity subject to tax has any in-state aspects upon which the state can base its jurisdiction to tax. When there is a definite link between the state and the interstate activity, due process nexus is satisfied. Only when there is no in-state connection between the transaction and the taxing state is due process nexus absent.

In the instant case, appellant's in-State solicitation activities, though a part of interstate commerce, more than provide the minimal connection necessary to satisfy the Due Process Clause. Only if there were no in-State activity connected with the interstate sales would due process preclude West Virginia from taxing the sales at issue. The due

process nexus test should be thought of as a threshold test which requires only a minimal local connection to justify a state tax. Such a limitation may seem minor, however, it was just that lack of minimal connection which was the decisive factor in American Oil Co. v. Neill, 380 U.S. 491 (1965).

In American Oil the State of Idaho attempted to tax a sale of gasoline which occurred wholly in the State of Utah. The facts of the case clearly demonstrated that every phase of the sales transaction, from the initial negotiations to the completed delivery, occurred outside of Idaho. The Court concluded that there was simply no in-state activity connected with the out-of-state sales transactions upon which to base the tax.

Likewise, the Due Process Clause should be interpreted as only prohibiting the State of West Virginia from imposing its privilege tax on an interstate activity completely independent of the State. For example, due process would preclude West Virginia from the privilege taxation of a business activity which occurred wholly out of State. However, when a corporation avails itself of the substantial privilege of conducting a portion of its interstate business in West Virginia, due process is satisfied. See, Mobil Oil, supra.

The Norton, decision supra, should be viewed by this Court in the context in which it was written. Interstate commerce was not subject to direct state taxation. The local aspects of the interstate activity itself could, therefore, not provide the due process minimal

connection necessary to afford a state the jurisdiction to tax. The interstate activity was only indirectly subject to state taxation when there was an associated intrastate business which could serve as the incidence of the tax and supply the requisite minimal local connection. Courts, therefore, focused their examination on whether there was an intrastate activity to provide the necessary local incident and whether there was a sufficient connection between the taxpayer's intrastate and interstate business activities. The disassociation concept of Norton, supra, was designed to determine whether the interstate activity was sufficiently connected with an intrastate activity of the taxpayer to permit the inclusion of interstate receipts in the measure of the intrastate tax. If there were not sufficient connection, the

interstate activity was said to be disassociated from the local business and the minimal local connection necessary to satisfy due process requirements was absent.

Since interstate business activity is now subject to direct State taxation, there no longer has to be an associated intrastate activity. The local portion of the interstate business can now supply its own due process minimal connection. An interstate activity with sufficient local aspects is taxable regardless of its disassociation from the taxpayer's other in-state business. Since the circumstances which the Norton, disassociation test supra, was designed to identify are no longer relevant, the disassociation principle's function is of limited utility. The disassociation concept should operate, with respect to the

current scope of state taxation of interstate commerce, only to ensure that there are sufficient local aspects of the interstate business activity to supply the due process minimal connection. See, American Oil, supra.

Due process nexus should be viewed as a threshold requirement used to determine whether a corporation has subjected itself to the taxing power of the state. If its activities provide a definite link between the corporation and the state, a minimal connection which affords the state the jurisdiction to tax is established. See, Miller Bros. Co. v. Maryland, 347 U.S. 340 (1954). In the current case, each of appellant's divisions, which make sales to West Virginia customers, utilizes personnel within West Virginia to solicit those sales. The in-State presence of the appellant in

furtherance of its selling activities more than affords West Virginia the jurisdiction to tax such activities in accordance with due process requirements. See, Scripto Inc. v. Carson, 362 U.S. 207 (1960).

C. COMMERCE CLAUSE NEXUS CONSIDERATIONS

An examination of the Commerce Clause limitations on the power of a state to tax interstate commerce should be initiated with certain general principles in mind. In Commonwealth Edison, supra, this Court placed the Commerce Clause constitutional protections of interstat commerce in proper perspective. This Court stated the following:

> "There is no reason to suppose that this latitude afforded the States under the Due Process Clause is somehow divested by the Commerce Clause

> merely because the taxed activity has some connection to interstate commerce; particularly when the tax is levied on an activity conducted within the State. 'The exploitation by foreign corporations [or consumers] of intrastate opportunities under the protection and encouragement of local government offers a basis for taxation as unrestricted as that for domestic corporations.' [Citations omitted] * * *" Id., 453 U.S. at 623.

This Court based the above declaration on its long-standing position that it was not the purpose of the Commerce Clause to relieve those engaged in interstate commerce from their just share of state tax burdens. Concurrently, this Court in Complete Auto Transit, Inc. v. Brady, supra, has recognized that a state has a significant interest in exacting from interstate commerce its fair share of the cost of state government. Therefore, the Commerce Clause's constitutional concern in state taxation is simply

whether a state is making a fair demand of that aspect of interstate commerce to which the state bears a special relation. Traditionally, the Commerce Clause has impinged on a state's levy of tax only when such tax discriminates against or prohibits interstate activities or places interstate commerce at a disadvantage relative to local commerce. See, Central Greyhound Lines v. Mealey, 344 U.S. 653 (1948). If no such discriminatory effect exists, the state is free to pursue its own fiscal policies unembarrassed by the United States Constitution.

In the present case, this Court is examining a privilege tax which the appellant submits offends the Commerce Clause when applied to its activities due to insufficient nexus. Such contention not only ignores the realities of the appellant's West Virginia business

operations but also completely misinterprets the purpose and scope of the Commerce Clause's protection of interstate activities. This Court has repeatedly acknowledged that all state tax burdens do not impermissibly impede interstate commerce, and the Commerce Clause balance tips against the state tax only when it unfairly burdens commerce by exacting from the interstate activity more than its just share of the cost of state government. See, Washington Revenue Dept. v. Association of Wash. Stevedoring Cos., 437 U.S. 734 (1978).

Determination of whether the state is exacting from an interstate activity a just share of the cost of government has focused on an examination of the in-state aspects of the interstate business. If the local portion of the interstate activity is of sufficient substance, the

state may tax directly the privilege of conducting the interstate business. The sufficiency of the local activity is of course the nexus requirement. The nexus requirement of the Commerce Clause is virtually identical to that of the Due Process Clause. Both constitutional provisions require a minimal local activity, which is afforded by the state benefits and services. If such local activity is present, a tax may be imposed in return for the benefits and protections the state provides. In adjudging the sufficiency of said local activity, this Court has endeavored to establish a consistent and rational method of inquiry whereby the practical effect of a challenged tax is examined. Mobil Oil, supra.

Analysis of the nexus requirement, in terms of a tax's practical operation

and its relation to in-state activity, requires consideration on a case-by-case basis since the nexus issue is fact bound. No definitive guideline can be applied in all cases. Therefore, there is no simple test for evaluating the sufficiency of nexus. When examining the propriety of taxes levied on the privilege of selling, such as the tax in this case, this Court has consistently upheld the state tax when the in-state activity was substantial with relation to the establishment and maintenance of sales. See, General Motors Corp. v. Washington, 377 U.S. 436 (1964).

In Standard Pressed Steel Co. v. Department of Revenue of Washington, 419 U.S. 560 (1975), this Court applied nexus requirements, relevant to interstate sales, to a factual situation very similar to the case at bar. According to the

Court, the taxpayer in that case had the following contacts with the State of Washington, the State seeking to impose a business privilege tax:

> "In the years relevant here it had one employee, one Martinson, in Washington who was paid a salary and who operated out of his home near Seattle. He was an engineer whose primary duty was to consult with Boeing regarding its anticipated needs and requirements for aerospace fasteners and to follow up any difficulties in the use of appellant's product after delivery. Martinson was assisted by a group of engineers of appellant who visited Boeing about three days every six weeks, their meetings being arranged by Martinson. Martinson did not take orders from Boeing; they were sent directly to appellant. Orders accepted would be filled and shipment made by common carrier to Boeing direct, all payments being made directly to appellant. Martinson had no office except in his home; he had no secretary; but appellant maintained an answering service in the Seattle area which received calls for Martinson, bills for that service

being sent direct to appellant." Id., 419 U.S. at 561.

After summarizing the taxpayer's contacts, this Court quoted the Washington State Board of Tax Appeals' analysis of the taxpayer's activities. Said Board of Tax Appeals found that the activities of the taxpayer's representative were necessary to the taxpayer:

> "[I]n making it aware of which products Boeing might use, in obtaining the engineering design of those products, in securing the testing of sample products to qualify them for sale to Boeing, in resolving problems of their use after receipt by Boeing, in obtaining and retaining good will and rapport with Boeing personnel, and in keeping the invoicing personnel of appellant up to date on Boeing's list of purchasing specialists or control buyers. * * *" Id., 419 U.S. at 561.

Upon consideration of the foregoing contacts between the State of Washington and

the taxpayer, Standard Pressed Steel, this Court concluded that the question of the sufficiency of in-State activities upon which to base the privilege tax at issue was frivolous. This Court felt that it was obvious that the taxpayer's representative made possible the realization and continuance of valuable contractual relations between the taxpayer and its customer.

While appellant in this case did not have personnel residing within this State, it did have numerous representatives actively engaged within West Virginia in all of the activities engaged in by Standard Pressed Steel's representative in Washington. Appellant's sales representatives made it aware of products its in-State customers might use; made said customers aware of appellant's existing product line and any new products;

made follow-up calls to customers to check product quality and client satisfaction; and obtained and retained good will and rapport with their client's personnel. Given such complete intrusion into the West Virginia market as exhibited by appellant, it is equally frivolous to contend that such activities do not make possible the realization and continuance of valuable contractual relations and do not amount to engaging in the business of selling within West Virginia.

Appellant's sales representatives solicited new business and serviced existing customers within West Virginia. Obviously such activities made possible the realization and continuance of valuable contractual relations or appellant would not have continued to maintain its West Virginia sales force. Appellant

without its in-State solicitation could not have as effectively maintained its existing business or attracted new customers. Appellant's wholesale sales to its West Virginia customers would not exist at their current level but for its in-State activities in furtherance of such sales. Therefore, appellant's in-State business activities, which are essential to the establishment and maintenance of sales and make possible the continuance of valuable contractual relationships, subject it to this State's business and occupation tax consistent with Commerce Clause nexus guidelines.

It was the appellee's position before the West Virginia Supreme Court of Appeals that even though the appellant's activities, solely with regard to the sales in dispute, were more than sufficient to establish the required nexus to

tax, the Court should also consider the overall local business of the appellant as pertinent to the nexus issue. The West Virginia Supreme Court adopted such position and determined that in addition to the business activities strictly associated with the sales at issue, the sufficiency of nexus must be determined in light of a corporation's total in-State activities. The lower court's decision, therefore, refused to examine appellant's sales activities in isolation from its total West Virginia business operation.

The West Virginia Supreme Court recognized the true nature of the Commerce Clause nexus requirement and reviewed the substantial nexus issue in terms of the full scope of appellant's in-State business activities. The lower Court accurately observed that the principles of the unitary business concept were

relevant in reviewing the nexus question in this case. The West Virginia Supreme Court of Appeals' approach to the substantial nexus question is proper in all respects.

In the last several years, this Court, when reviewing the State taxation of an interstate activity, has endeavored to determine the economic realities of a situation and adjudge the validity of a tax's imposition according to practical considerations. Such practical approach is clearly evidenced by this Court's recognition that a business' various aspects are interrelated and that the factors of profitability arise from the operation of the business as a whole. Mobil Oil, supra. This Court has further recognized that it is impossible to precisely determine to what degree one portion of a business aids another and how much the

integration of the business adds to each of its parts. Since every aspect of a unified business contribute to all other aspects, it is misleading to characterize the income of the business as having a single identifiable source. Mobil Oil, supra.

Likewise, when analyzing the benefits one aspect of an integrated business receives from a state, it is misleading to consider that aspect in isolation. The benefits accorded by a state to any portion of a business contribute to the business as a whole and every other aspect of that business is enhanced to some degree. Therefore, when an in-state business activity is evaluated in terms of the amount of local services the state extends to the taxpayer, the total activities of the taxpayer within the taxing state must be considered.

The Commerce Clause's nexus requirement has always been closely associated with the fair relation to services provided by the state, standard. If the state has given anything for which it can ask a return, a state tax passes constitutional muster if there is a minimum connection between its interstate activities and the taxing state, or if there is merely a rational relationship between the income attributed to the state and the intrastate values of its enterprise. Asarco Inc. v. Idaho State Tax Comm'n, 102 S. Ct. 3103 (1982) (Justice O'Connor dissenting). See also: Commonwealth Edison, supra.

In General Motors Corp. v. Washington, 377 U.S. 436 (1964), this Court examined the sufficiency of nexus between the State of Washington and a taxpayer's

local activities in terms of whether the State had exerted its power in proportion to the taxpayer's enjoyment of the opportunities and protection which the State had afforded. In General Motors, supra, the Court identified the issue as follows:

> "A careful analysis of the cases in this field teaches that the validity of the tax rests upon whether the State is exacting a constitutionally fair demand for that aspect of interstate commerce to which it bears a special relation.
>
> "For our purposes the decisive issue turns on the operating incidence of the tax. In other words, the question is whether the State has exerted its power in proper proportion to appellant's activities within the State and to appellant's consequent enjoyment of the opportunities and protections which the State has afforded. Where, as in the instant case, the taxing State is not the domiciliary State, we look to the taxpayer's business activities within the State, i.e., the local incidents, to determine if the gross receipts from

> sales therein may be fairly related to those activities. As was said in Wisconsin v. J. C. Penney Co., 311 U.S. 435, 444, 61 S.Ct. 246, 250, 85 L.Ed. 267 (1940), '[t]he simple but controlling question is whether the state has given anything for which it can ask return.'" Id. at 440, 441.

The resolution, in General Motors, supra, of whether there was sufficient local incident to justify the tax on interstate sales, considered all of the taxpayer's in-state business activities and not just those directly associated with the sales at issue. This Court stated:

> "Although mere entry into a State does not take from a corporation the right to continue to do an interstate business with tax immunity, it does not follow that the corporation can channel its operations through such a maze of local connections as does General Motors, and take advantage of its gain on domesticity, and still maintain that same degree of immunity." Id. at 448.

General Motors' activities in the State of Washington were viewed as a "bundle of corporate activity" which was so thoroughly enmeshed in local connections that the entire activities of the taxpayer within the state were relevant in determining the sufficiency of nexus. The Court's recognition that other aspects of General Motors' Washington business activities contributed to the sales at issue was a forerunner of the unitary business concept.

In Asarco, supra, this Court identifies General Motors, supra, as a case involving the unitary business principle. General Motors acknowledged that there was an interrelationship between a business' various facets and that one portion of a business may directly contribute to the successful operation of another. The unitary concept recognizes that all parts

of an integrated business necessarily contribute to all other parts and no one aspect of a business can be viewed in isolation from the operation of the business enterprise as a whole. The appellee submits that, based upon the unitary principle, the nexus issue should be resolved in terms of the full scope of business activities in the state. Only by considering a taxpayer's total activities can an accurate assessment be made of whether the taxpayer is being subject to tax commensurate with the benefits it is receiving from the taxing state.

The West Virginia Supreme Court's refusal to isolate appellant's local activities into compartments and view each compartment separately with regard to the nexus issue is justified by the unitary business principle and by the nature of the appellant's business enterprise.

Appellant is a vertically integrated corporation engaged in every aspect of the production and sale of steel products. As a vertically integrated corporation, it is clear that each of its business operations is part of a functionally integrated enterprise carried on with a common corporate purpose. The mere operation of appellant's business activities on a divisional basis does not establish a disassociation between the divisions. See, Exxon Corp. v. Wisconsin Dept. of Revenue, 447 U.S. 207 (1980).

Appellant's in-State business activities are set out in the Statement of the Case section of this brief. Such activities included, in addition to the sales at issue, the production of coal, which was subsequently used by appellant in the manufacture of steel, and the wholesale and retail sale of metal products from a

South Charleston, West Virginia, office to customers statewide, including the West Virginia Department of Highways. (J.A. 23, 24). The full scope of its West Virginia activities, including its selling activities at issue were a part of its unitary business operation. Therefore, appellant's entire in-State business operation is properly subject to scrutiny in determining whether nexus for any portion thereof exists between the State of West Virginia and the appellant.

The West Virginia Supreme Court correctly applied the Commerce Clause's nexus test to appellant's disputed in-State activities in this case. The "substantial" qualification applied to nexus is designed to simply insure that the measure of the tax reaches income which is rationally related to the intrastate values of the business. Commonwealth

Edison, supra, characterized "substantial" nexus as a minimal connection threshold requirement with the additional limitation that the measure of the tax must be reasonably related to the extent of the taxpayer's contact in the State. In Commonwealth Edison, supra, because the measure of the tax was a percentage of the value of the coal mined in Montana, the mining of coal being the incidence of the tax, the tax was found to be in proper proportion to the appellant's activities within that State. In the instant case, the incidence of West Virginia's privilege tax is selling activities in the State and the measure of the tax is a percentage of the gross receipts of the sales resulting from such activities. Since the tax is levied only upon West Virginia sales, it is in proper proportion to the appellant's activities

in-State. See, Standard Pressed Steel, supra.

Commerce Clause nexus considerations require a local activity of sufficient substance to insure that an out-of-state taxpayer is receiving state services and benefits commensurate with the amount of tax imposed upon its intrastate activities. Since all portions of a unified business are inherently interrelated, the sufficiency of the local activity of the taxpayer should be adjudged according to the full scope of a taxpayer's in-State business operations. When a state tax is imposed on a local incident in relation to the extent of the in-State activity and measured accordingly, Commerce Clause requirements are satisfied. West Virginia's taxation of appellant's in-State selling activities fulfills all of the Commerce Clause's requirements.

Appellant takes a far different approach in analyzing the Commerce Clause's nexus standard. Initially, appellant contends that its sales in issue must be viewed separately from its other in-State business, because the sales are made by divisions of its business which have no other in-State operations. The appellant then submits that although the sales activities, themselves, do have some in-State aspects, such aspects are not "substantial" enough to provide the necessary nexus connection. Appellant justifies its position by reference to the Norton disassociation principle, supra, which it contends requires a determination of Commerce Clause nexus requirements on a transactional basis, that is by examination of each of its business activities separately.

The appellee submits that every component of appellant's argument is wrong. First the practical considerations of the unitary concept recognize that all portions of an integrated business are interrelated, regardless of the internal division of the corporation. A business activity of a unified corporation must be considered in conjunction with other in-State activities of the taxpayer when reviewing the nexus issue. Therefore, appellant's selling activities in West Virginia, clearly being a part of its unitary business, cannot be isolated from its other in-State operations for purposes of determining their nexus.

Secondly, appellant's selling activities in West Virginia, even considered apart from its other business operations, more than satisfy the substantial nexus test of the Commerce Clause. Clearly,

appellant could not have generated the same volume of sales to West Virginia customers without the in-State presence of its representatives. Appellant's sales activities in West Virginia are, therefore, essential to the establishment and maintenance of its sales and make possible the continuance of valuable contractual relationships.

Lastly, appellee submits that appellant's application of the Norton disassociation principle supra, is completely improper. Appellant contends that the Norton disassociation concept requires that its selling activities be viewed separately in determining whether such activities have a "substantial" nexus with the State. The Norton disassociation test, however, as herein discussed, is an outdated due process concept that has no relevance to the Commerce Clause's

"substantial" nexus requirement. The following quote from American Oil, supra, clearly establishes that the disassociation principle is a due process precept:

> "The corporation can, however, exempt itself by a clear showing that there are no in-state activities connected with out-of-state sales. In such instances, the transactions are said to be 'disassociated from the local business,' Norton Co. v. Department of Revenue, supra, at 537, and therefore may not, consistent with due process, be taxed." Id. at 458.

The Norton, supra, decision was rendered at a time when interstate commerce could not be directly subjected to tax. Local aspects of an interstate activity could only be taxed when there was an associated intrastate business which could serve as the incidence of the tax and supply the required local connection. Norton's disassociation standard was designed to determine whether an interstate

activity was sufficiently connected with an intrastate activity of the taxpayer to permit the inclusion of a portion of the interstate receipts in the measure of a local tax. Clearly the Norton disassociation concept, supra, has no pertinence to a Commerce Clause nexus question. Since an interstate activity can now supply its own local connection, its disassociation from other in-State business is irrelevant. Norton's disassociation principle, developed years before permissible direct State taxation of interstate commerce, has no bearing on whether an interstate activity is sufficiently connected with a state so as to allow its direct taxation.

Commerce Clause nexus considerations examine the sufficiency of the in-state portion of an interstate activity to determine whether that state may impose a

tax on said interstate business. An interstate sale is said to be sufficiently connected to a state for taxation if the selling activities within that state are essential to the establishment and maintenance of the sale. Standard Pressed Steel, supra. Appellant's West Virginia selling activities, with respect to the sales at issue, were a decisive factor in its capturing and holding the West Virginia market and their taxation is clearly consistent with Commerce Clause nexus requirements.

Nexus with the taxing state also should be viewed in terms of the tax bearing a fair relation to services provided. In the case of an integrated business such as appellant's all aspects of such business contribute to all other aspects. The sufficiency of the local portion of an interstate activity should

therefore be determined with regard to the full scope of a taxpayer's in-state business operations. Appellant's bundle of corporate activity conducted in West Virginia provides the substantial local connection necessary to insure that the taxation of appellant's in-State selling activities is commensurate with the services and benefits it is receiving from the State of West Virginia.

D. CONCLUSION

West Virginia's business and occupation tax is levied upon the exercise of specified business privileges within the State and only business activities with local aspects are subject to tax. Other states impose tax on a business' apportioned income, regardless the source of such income. The total income of a business is subject to tax by such states in

proportion to the value of the business operations within the state. Northwestern States Portland Cement Co. v. Minnesota, 358 U.S. 460 (1959)

In states with apportioned taxes, income derived from activities beyond the state's borders is subject to tax if the income was earned from activities related to the taxpayer's activities in the taxing state. Mobil, supra. If the out-of-state income, however, is derived from a discrete business enterprise, a state may not, consistent with the Due Process Clause, subject that income to apportioned taxation. Such taxation by a state of unrelated out-of-state income would constitute the taxation of value earned outside the state's borders and, therefore, would violate the due process minimal connection test, Asarco, supra.

In states with apportioned taxes the question of proper territorial allocations of value is quite relevant to nexus considerations. However, given the inherently local nature of West Virginia's business and occupation tax, the question of said tax's imposition on extraterritorial values, in violation of the Due Process Clause, is frivolous. West Virginia taxes only business activities directly connected with the State and due process nexus is inherent in the subject of the tax.

Appellant's contention that West Virginia's taxation of its interstate selling activities constitutes the taxation of extraterritorial values and as such violates nexus requirements is a total misapplication of constitutional provisions. A tax on the in-state portion of an interstate business when

measured by the gross receipts from the completed activity will always to some degree reflect in such measure values from out-of-state activity. The measure of a tax need not, however, adhere strictly to values associated with the taxing state. The measure of the tax need only be reasonably related to the extent of the taxpayer's contact with the taxing state. A tax's measure is reasonably related to the taxpayer's in-state activities when it is tied to the earnings which the state has made possible. Commonwealth Edison, supra.

In Standard Pressed Steel, supra, this Court approved the use of gross receipts as the measure of a privilege tax on selling activities in a situation almost identical to the present case. This Court looked to the subject of the tax, selling activities conducted in

Washington, and inasmuch as the tax was levied only upon Washington sales, the tax was apportioned exactly to the activities taxed and measured in accordance with the earnings the State had made possible. Likewise, West Virginia's tax is apportioned to appellant's selling activities conducted in the State. Since the tax is measured upon only those receipts from sales to West Virginia customers, the measure of the tax is clearly reasonably related to the extent of the appellant's in-State contact.

In any event, the measure of West Virginia's privilege tax on appellant is not at issue. Appellant's allusion to the State's taxation of extraterritorial value is a purposely vague allegation designed to avoid rational discussion of the constitutional limits of state

taxation, just as its whole position is an attempt to avoid its fair share of the cost of state government. If West Virginia were precluded from taxing the selling activities at issue, what state would levy upon said activities? Appellant's lack of a multiple taxation claim clearly indicates that no other state could tax such selling activities.

This Court should consider not only any potential tax burden on interstate commerce, which would arise from the West Virginia Supreme Court of Appeals' application of the unitary concept to constitutional nexus questions, it should also consider the potential disruption of state privilege tax systems if the Norton disassociation principle, supra, is interpreted to require a state to have substantial nexus with every transaction of every division of a taxpayer carrying on

business in that state. The possibilities for tax avoidance are apparent. Corporations could establish unlimited corporate divisions and require a state to examine each division's activities separately. This would result in not only improper tax avoidance, but would cause extreme difficulties in the administration of taxes. Literally thousands of businesses enter the State's market place and make sales to West Virginia customers. If every transaction of every business had to be analyzed separately, the State's ability to tax its rightful share of an interstate business would be greatly impaired.

The appellee respectfully urges this Court to maintain its practical approach to the resolution of interstate commerce tax issues and affirm the decision below. The West Virginia Supreme Court of

Appeals' decision properly applies constitutional nexus provisions to the appellant's in-State selling operations. The decision correctly concludes that the due process minimal connection necessary is supplied by the in-State presence of the appellant and that Commerce Clause's nexus requirements are satisfied by the appellant's in-State solicitation activities in furtherance of its local sales. The lower Court's use of the unitary concept in adjudging the tax's relation to benefits provided by the State is consistent with this Court's recognition that all portions of an integrated business are interrelated and each portion contributes to all other aspects. This Court should maintain its general approval of the taxation of interstate sales by the state of destination, when such state

has a sufficient connection with the taxpayer's selling activities.

II.

THE IMPOSITION OF THE WEST VIRGINIA BUSINESS AND OCCUPATION TAX UPON APPELLANT'S BUSINESS ACTIVITY OF MAKING WHOLESALE SALES IN WEST VIRGINIA DOES NOT DISCRIMINATE AGAINST INTERSTATE COMMERCE.

Appellant asserts that the taxation by West Virginia of its wholesale selling activities discriminates against interstate commerce. The alleged basis of discrimination is the interplay between Sections 2, 2b, and 2c, of Chapter 11, Article 13, of the West Virginia Code of 1931, as amended. Specifically, the fifth paragraph of Code 11-13-2 provides that a person subject to the manufacturing privilege tax provided by Code 11-13-2b is not also subject to the wholesale sales business tax provided by Code

11-13-2c. Appellant contends that since an out-of-State manufacturer has to pay the wholesale sales tax under Code 11-13-2c, while the in-State manufacturer does not, this is discrimination against interstate commerce that violates the Commerce Clause. Appellee submits that the tax in question is not discriminatory in this manner.

First, the standard announced by this Court in determining if a state tax violates the Commerce Clause for being discriminatory is: "No state may, consistent with the Commerce Clause, 'impose a tax which discriminates against interstate commerce * * * by providing a direct commercial advantage to local business.'" Boston Stock Exchange v. State Tax Commission, 429 U.S. 318, 329 (1977). Further, when determining whether a state tax is discriminatory, the tax

must be assessed in light of its actual effect and considered in conjunction with other provisions of a state's taxation scheme. Maryland v. Louisiana, 451 U.S. 725 (1981). This principle was succinctly stated in Halliburton Oil Well Cementing Co. v. Reily, 373 U.S. 64 (1963), as follows: "proper analysis must take 'the whole scheme of taxation into account,'" and "equality for the purposes of competition and the flow of commerce is measured in dollars and cents, not legal abstractions."

Accordingly, the fact that a manufacturer subject to the West Virginia business and occupation tax on manufacturing (Code 11-13-2b) is not subject to the tax on wholesale sales does not amount to discrimination against interstate commerce. A West Virginia manufacturer is exempt from the wholesale sales

tax, imposed at the rate of .27 percent, only if he has paid the tax on manufacturing at the rather substantial rate of .88 percent. Given these different tax rates, it cannot be said that an in-State manufacturer who sells its product in West Virginia is going untaxed while an out-of-State manufacturer is carrying an unfair share of the tax burden. The Legislature saw fit to tax manufacturing at a higher rate and then allow the manufacturer to sell its product at the wholesale level tax free. If the in-State manufacturer sells West Virginia manufactured products at the retail level, or any other person sells those products at wholesale, such sales are subject to taxation. Thus, the only time that a wholesale sale of West Virginia manufactured products goes tax free is when it is sold by a manufacturer who has paid tax on the manufacturing privilege at a much higher

rate. This is an entirely reasonable system of taxation of the manufacture and sale of products in West Virginia that does not discriminate against interstate commerce.

This Court has upheld similar systems of state taxation. In Caskey Baking Co. v. Virginia, 313 U.S. 117 (1941), the tax complained of there was an annual license tax of One Hundred Dollars ($100.00) imposed for each vehicle used in the business of peddling goods or merchandise. The license tax did not apply to local manufacturers that paid a tax on their capital or local distributors having a fixed place of business in the state who paid a state tax on their purchases. Thus, the practical effect of the statute was that the vehicles of local manufacturers and distributors were exempt from the license tax, while the

vehicles of vendors domiciled out of state were subject to the tax. The appellant in the case was a West Virginia bakery that sent its trucks into Virginia to sell bakery goods. This Court held the license tax to be constitutional, upon a finding that the tax in question was but one portion of a reasonable comprehensive scheme of taxation. Also, the Court held that while local manufacturers and distributors were not subject to the tax on their vehicles, they paid other state taxes which the state deemed sufficient to cover all of their activities, including the vending of goods. The Court in its decision also noted if the license tax was not allowed, the out-of-state vendors would be the only vendors in Virginia to escape some form of taxation.

Likewise, in the case of Alaska v. Arctic Maid, 366 U.S. 199 (1961), cited by the lower court, the tax involved was a 4 percent occupation tax on freezer ships processing fish taken from Alaskan waters. The taxpayer there used freezer ships for the taking and preservation of salmon along Alaska's shores. After freezing the fish, the freezer ship would return to the State of Washington where the fish were canned. The taxpayer claimed discrimination, since fish that were caught and canned in Alaska were not subject to the 4 percent tax. This Court looked at Alaska's entire scheme of taxation and upheld the tax, saying:

> "It is claimed that there was no tax on salmon caught and frozen in Alaska and destined for canning in Alaska and that therefore this law is discriminatory against freezer ships. Alaskan canneries, however, paid a six-percent tax on the value of salmon obtained for

canning; and local fish processors, which sell to the fresh-frozen consumer market, paid a one-percent tax. The freezer ships do not compete with those who freeze fish for the retail market. The freezer ships take their catches south for canning. Their competitors are the Alaskan canners; and we know from the record that fish canned locally usually are not frozen. When we look at the tax laid on local canners and those laid on 'freezer ships,' there is no discrimination in favor of the former and against the latter. For no matter how the tax on 'freezer ships' is computed, it did not exceed the six-percent tax on the local canners. * * * If there is a difference between the taxes imposed on these freezer ships and the taxes imposed on their competitors, they are not so 'palpably disproportionate' (International Harvester Co. v. Evatt, 329 US 416, 422, 91 L Ed 390, 395, 67 S Ct 435) as to run afoul of the Commerce Clause. No 'iron rule of equality' between taxes laid by a State on different types of business is necessary." (Citations omitted.) 366 U.S. at 204 - 205.

See also, Gregg Dyeing Co. v. Query, 286 U.S. 472 (1932).

Appellant's reliance on Columbia Steel Co. v. State, 30 Wash. 2d 658, 192 P.2d. 976 (1948), is thoroughly misplaced. Columbia Steel did involve an exemption in the State of Washington's privilege tax system which was virtually identical to the exemption in this case, and said exemption was found to discriminate against interstate commerce. However, the Washington Supreme Court in that case did not attempt to analyze the issue in terms of the actual effect of the exemption or consider the exemption in conjunction with the State's other tax provisions. The Court clearly invalidated the tax on purely semantic grounds without consideration of the practical economic realities involved.

The semantic approach of the Washington Court to the discrimination issue is illustrated in its later decision in

B. F. Goodrich Co. v. State, 38 Wash. 2d 663, 231 P.2d 325 (1951). In that case the Court reviewed the Washington privilege tax system as amended in response to the Columbia Steel, supra, decision. The Court stated:

> As amended in 1943, this statute provided that persons taxable as manufacturers should not be taxable as wholesalers. Rem. Supp.1943, § 8370-6. As so written, we held that it marked an unconstitutional discrimination against interstate commerce, in that it levied a tax upon wholesale activities of those engaged in such commerce, while exempting those who performed the same taxable act, to wit, the sale at wholesale, if they manufactured in the state of Washington. Columbia Steel Co. v. State, 30 Wash.2d 658, 192 P.2d 976; Weyerhaeuser Sales Co. v. State Tax Commission, 30 Wash.2d 947, 192 P.2d 979. In an attempt to cure this defect, the legislature in its extraordinary session of 1950, rewrote the statute in the form quoted above, so that it now lays a tax equally upon all those selling at wholesale within the state, but further provides that those who are taxed as wholesalers

> shall not be taxed as manufacturers. The procedure for exemption of those who perform both the taxable acts of manufacture and sale has thus been exactly reversed; the local manufacturer-wholesaler, instead of being exempt from tax as a wholesaler, is instead exempt as a manufacturer.
>
> Although respondents plainly regard this change as purely verbal (it may well be; but the cases in this field often turn, unfortunately, on just such verbal niceties), they also assert that it has rendered the statute invulnerable to any attack that an out-of-state manufacturer who sells his product within the state may direct against it on the ground that it unconstitutionally discriminates against him. With this position we agree. 231 P.2d at 328 (Emphasis supplied.)

The Washington Supreme Court's recognition that the decision turned not on the practical effects of the tax system but on verbal niceties demonstrates its improper analysis of the issue in terms of legal abstraction rather than dollars and cents. This Court's recent opinion

in Washington v. United States, __U.S.__, 103 S.Ct. 1344 (1983) reiterates that a determination of whether a tax is discriminatory should be made with regard to the economic burdens that result. West Virginia's privilege tax system and the exemptions involved therein should be adjudged with respect to its economic consequences and not according to hypothetical allegations.

Therefore, although in-State manufacturers do not pay under the wholesale sales classification of the business and occupation tax, they nevertheless must pay a tax, at a much higher rate, on the entire manufacturing privilege. Given the tax burden placed on the in-State manufacturer, it cannot be said that appellant pays a disproportionate amount of tax on its in-State sales.

The exact issue presented in this case has been previously presented to this Court in Columbia Gas Transmission Corporation v. Herschel H. Rose, III, Tax Commissioner of West Virginia, 103 S. Ct. 32 (1982). In that case, the identical interplay of the statutes at issue was challenged. The fifth paragraph of Code 11-13-2 exempts from the payment of the State's wholesale sales privilege tax not only those selling products whose manufacture was subject to the State's manufacturing privilege tax but also the sale of natural resource products whose production was subject to the State's production privilege tax. Columbia Gas as an out-of-State producer of natural gas, claimed that the taxation of its in-State wholesale sales, in light of the exemption accorded in-State producers, acted as a discrimination against interstate commerce. This Court's dismissal of the

Columbia Gas appeal should serve as controlling precedent in this case.

CONCLUSIONS

For the foregoing reasons, appellee submits that the application of West Virginia's privilege tax to appellant's in-State selling activities is constitutional in all respects. Therefore, the decision of the West Virginia Supreme Court of Appeals is clearly correct and should be affirmed.

Respectfully submitted,

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No. 83-297

IN THE

Supreme Court of the United States

OCTOBER TERM, 1983

ARMCO INC.,

Appellant,

v.

DAVID C. HARDESTY, JR.,
State Tax Commissioner of West Virginia,

Appellee.

ON APPEAL FROM THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

APPELLANT'S REPLY BRIEF

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APPELLANT'S REPLY BRIEF

INTRODUCTION

The Brief on the Merits filed by the Appellee, and the Brief of the State of Washington as *amicus curiae* in support of Appellee, assert two points toward which these remarks are directed. The first is that the solicitation within West Virginia of some of the sales at issue here by Armco's nonresident salesmen provides the nexus required by the Due Process Clause and the Commerce Clause to impose the taxes involved here. And the second is that the existence of another tax imposed at a higher rate upon local manufacturers in West Virginia cures the otherwise discriminatory nature of the West Virginia tax on wholesale sales. The question of the application of the unitary business theory to the facts presented by this

appeal has been fully discussed in the briefs previously filed. It will not be discussed further here, except to note that the *amicus* Washington State supports Armco's view that application of the unitary business theory in this case is inappropriate.

Aside from two potentially confusing points, there remains no significant disagreement as to the facts. The first point relates to whether Armco serviced products in West Virginia. The record clearly establishes that Armco did not service, install or repair any products which it sold to customers in West Virginia. J.A. 21, 28. Appellee makes reference to the statement of a witness regarding "service work" performed by Armco in West Virginia. Appellee's Br. 4-5; *see* J.A. 17. A reading of the entire record makes it clear that the witness was referring to "service" of the customer account, not the product sold. And second, Appellee makes a series of conclusory statements regarding the degree to which solicitation in West Virginia contributed to sales by Armco to West Virginia customers. Appellee's Br. 15, 49-50, 64-65. Armco notes that there is no evidence in the record to support any of those statements.

ARGUMENT

I

TERRITORIAL LIMITATIONS ON STATE TAXING POWER

With regard to the constitutional significance of the solicitation within West Virginia by nonresident Armco salesmen of some of the sales in question here, the proceedings below in West Virginia deserve mention. At the administrative hearing level, the West Virginia State Tax Commissioner, an officer of the executive rather than judicial branch of the state government, had no authority to pass upon the constitutional validity of a West Virginia tax. *State ex rel. Karnes v. Dadisman*, 153 W. Va. 771, 781; 172 S.E.2d 561, 568 (1970). The Circuit Court in West Virginia, however, squarely faced the constitutional issue and held that "the solicitation on a part-time basis in this state by the nonresident traveling salesmen does not constitute a 'substantial nexus'." J.S. 27a. Interestingly, on appeal to the

Court below, it declined to consider the question of the constitutional impact of solicitation within the state. It turned instead to the unitary business theory, even though it had previously held mere solicitation sufficient for purposes of finding the constitutionally required nexus. *Cincinnati Milacron Co. v. Hardesty*, 290 S.E.2d 902 (1982).[1]

While the opinion below is silent with respect to the constitutional aspects of solicitation within West Virginia, it is difficult not to conclude that reliance by the Court below on the unitary business theory was attributable to the findings by the Circuit Court that sales of metal buildings by Armco in West Virginia involved no solicitation at all within the state, and that, of the remaining sales at issue, some 77 percent were solicited outside West Virginia. J.S. 26a, 30a. The Court below does not mention these findings. Nor for that matter does the Appellee in urging this Court to conclude that the activities of Armco's salesmen were sufficient to warrant taxation of the gross receipts from all of Armco's sales to customers in West Virginia. But in any event, the curious result of all this is that the State of West Virginia now seeks affirmance in this Court on a theory flatly rejected by the lower court in West Virginia and at a minimum not deemed worthy of mention by the Court below.

A. THE *NORTON* DISSOCIATION RULE CONTINUES TO PROHIBIT THE GROSS RECEIPTS TAXES IMPOSED UPON ARMCO BY WEST VIRGINIA.

1. THE DEMISE OF *SPECTOR* DID NOT ELIMINATE OR WEAKEN THE *NORTON* RULE.

In *Spector Motor Service, Inc. v. O'Connor*, 340 U.S. 602 (1951), the taxpayer was engaged in the interstate transportation of freight. As part of its interstate business it leased two terminals in Connecticut at which it employed some 27 people

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1 In fact, in a case argued before and decided by the Court below on the same days as this case, the Court below followed *Cincinnati Milacron* in concluding that mere solicitation was sufficient to provide the required nexus. *Williams and Co. v. Dailey*, 303 S.E.2d 737 (1983).

in various capacities. Connecticut sought to impose an apportioned net income tax upon the taxpayer "for the privilege of carrying on exclusively interstate transportation in the State." 340 U.S. at 608. This Court held unconstitutional the tax on the "privilege" of engaging in interstate commerce without regard to "how fairly it is apportioned to business done within the state." 340 U.S. at 609.

Some 26 years after the *Spector* decision, this Court was faced with a taxpayer engaged in interstate commerce, but conducting all of its business activities within the State of Mississippi. *Complete Auto Transit, Inc. v. Brady*, 430 U.S. 274 (1977). It transported motor vehicles from a railhead in Jackson, Mississippi to various dealers within the state, and the claim was made that under the *Spector* rule Mississippi could not impose a net income tax on the taxpayer. Quite understandably, that was the end of the *Spector* theory of immunity. It was overruled by *Complete Auto* which held that interstate commerce must pay its own way in terms of fairly apportioned state net income taxes. At the same time, however, *Complete Auto* was careful to point out that a state tax can only be "applied to an activity with a substantial nexus with the taxing State." 430 U.S. at 279.

Neither *Spector* nor *Complete Auto* involved a question of nexus or extra-territorial taxation because the net income taxes involved there were applied to net income earned within the taxing jurisdictions. In the present case, on the other hand, the issue is one of nexus. Armco maintains that the sales in question here were dissociated from its local activities within West Virginia and cannot be constitutionally taxed under the rule of *Norton Co. v. Dep't of Revenue of Illinois*, 340 U.S. 534 (1951). Appellee, however, links *Norton* and *Spector*, which were decided during the same Term of this Court, and portrays Armco as conducting a substantial business in West Virginia while hiding behind the Constitution to avoid its fair share of state taxes. That portrayal is more emotional than accurate or helpful. Armco makes no claim to immunity from tax based upon the interstate character of its sales. Its claim is simply that West Virginia here is attempting to reach the

proceeds from transactions lacking substantial nexus with the state and so is attempting to "tax value earned outside its borders." *ASARCO Inc. v. Idaho State Tax Comm'r*, 458 U.S. 307, 315 (1982).

The teaching of *Norton* has nothing to do with the *Spector* issue of the extent to which interstate commerce may be subjected to state taxation. To the contrary, the problem addressed by *Norton* is the extent to which a state may reach outside its borders to tax transactions, interstate or otherwise. The *Norton* Court said:

> Where a corporation chooses to stay at home in all respects except to send abroad advertising or drummers to solicit orders which are sent directly to the home office for acceptance, filling, and delivery back to the buyer, it is obvious that the State of the buyer has no local grip on the seller. Unless some local incident occurs sufficient to bring the transaction within its taxing power, the vendor is not taxable. *McLeod v. Dilworth Co.*, 322 U.S. 327.
>
> * * *
>
> But when, as here, the corporation has gone into the State to do local business by state permission and has submitted itself to the taxing power of the State, it can avoid taxation on some Illinois sales only by showing that particular transactions are dissociated from the local business and interstate in nature.

340 U.S. at 537.

Thus, the guiding principles applicable here are clear, practical and fair. Under *Complete Auto* a transaction may not be taxed unless it has a substantial nexus with the taxing jurisdiction. And even where the taxpayer is engaged in local business in the taxing jurisdiction, under *Norton* that local business does not serve to create a substantial nexus if the sales in question are dissociated from the taxpayer's local business. Accordingly, in the present case Armco's West Virginia coal mines and South Charleston office afford no constitutional justification for taxing the sales at issue here.

2. *COMPLETE AUTO* REAFFIRMED THE TRADITIONAL NEXUS RULES UNDERLYING *NORTON*.

The West Virginia tax at issue here is denominated a "privilege" tax. J.S. 58a. Assuming the impotence of *Norton*, Appellee goes on to interpret *Complete Auto* as approving all state taxes on the "privilege" of carrying on any activity which might be said to enjoy benefits provided by the state.

> The nexus requirement of the Commerce Clause is virtually identical to that of the Due Process Clause. Both constitutional provisions require a minimal local activity, which is afforded by the state benefits and services. If such local activity is present, a tax may be imposed in return for the benefits and protections the state provides.

Appellee's Br. 44.

It is true that *Complete Auto* rejected the rule "that a state tax on the 'privilege of doing business' is *per se* unconstitutional when it is applied to interstate commerce." 430 U.S. at 289. But in doing so, this Court certainly did not hold that every tax on the privilege of doing any business within a state was *per se* valid. The *Complete Auto* decision simply neutralized the effect of a state's use of the privilege terminology:

> There is no economic consequence that follows necessarily from the use of the particular words, "privilege of doing business," and a focus on that formalism merely obscures the question whether the tax produces a forbidden effect.

430 U.S. at 288.

Having rejected the significance of the language used by the state legislature in imposing the tax, *Complete Auto* made no substantive change in the constitutional limitations on a state's jurisdiction to tax. It did, however, require a more realistic analysis of the practical effect of a tax, and formulated from prior decisions of this Court the now familiar four-prong interpretation of the Commerce Clause:

> These decisions have considered not the formal language of the tax statute but rather its practical effect, and

> have sustained a tax against Commerce Clause challenge when the tax is applied to an activity with a substantial nexus with the taxing State, is fairly apportioned, does not discriminate against interstate commerce, and is fairly related to the services provided by the State.

430 U.S. at 279. *See also Commonwealth Edison Co. v. Montana*, 453 U.S. 609, 615 (1981).

Returning to the West Virginia tax on the gross receipts from wholesale sales, under *Complete Auto* the question here remains whether the Armco sales at issue constitute "an activity with a substantial nexus" with West Virginia.

B. MERE SOLICITATION IS INSUFFICIENT TO JUSTIFY TAXATION OF GROSS RECEIPTS FROM ARMCO'S SALES TO WEST VIRGINIA CUSTOMERS.

Appellee urges this Court to conclude that the solicitation within West Virginia of some of the sales in question here is sufficient to establish the required substantial nexus with West Virginia.[2] Appellee's proposal to tax the proceeds of sales which were merely solicited in West Virginia, as *amicus* Washington State observes, "invites the Court to plow new ground." *Amicus* Br. 5. For the reasons noted below, it is not necessary for this Court to adopt new rules regarding the sufficiency of mere solicitation to establish a nexus for imposition of gross receipts taxes, and Appellee's invitation to do so should be declined.

Continuous Local Presence. Appellee relies heavily upon *Standard Pressed Steel Co. v. Washington Dep't of Revenue*,

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2 As noted above, the Circuit Court found that there was no solicitation in West Virginia of Armco's sales of metal buildings, and that, of the remaining sales at issue, some 77 percent were solicited outside West Virginia. Armco pointed out in its Brief on the Merits that the 77 percent figure was apparently taken from a reference by a witness to the year 1976, a year outside the audit period involved. Armco Br. 5 n.2; *see* J.A. 17. However, from the context of the testimony the Circuit Court was wholly justified in its factual findings with respect to solicitation in West Virginia. Moreover, neither the decision of the Court below nor the Appellee's Brief on the Merits evidences any disagreement with the Circuit Court's conclusions.

419 U.S. 560 (1975), suggesting that the taxpayer's resident full-time employee in *Standard Pressed Steel* should be deemed equivalent to the nonresident Armco salesmen who solicited orders from time to time within West Virginia. Appellee's Br. 45-50.[3] In *Standard Pressed Steel*, the taxpayer employed an engineer whose function was to maintain continuous contact with the taxpayer's sole customer in the State of Washington. That engineer operated out of his home and could be reached through a local answering service maintained by the taxpayer. Upon these facts, this Court determined that there existed between the taxpayer and Washington State a sufficient nexus to support the imposition of tax by Washington State on sales to the taxpayer's local customer. That determination was based upon the employee's continuous availability to and constant interaction with the customer. Thus, in *Standard Pressed Steel* there was a continuous presence of the taxpayer within the state so that on a daily basis it held itself out as doing business there and could be found locally at any time by its customer. That situation is in marked contrast to the frequency and nature of Armco's solicitation activities in West Virginia, which fall far short of constituting a continuous local presence in West Virginia and do not involve the constant availability of Armco personnel to customers in West Virginia. That shortfall precludes Armco's solicitation activities from establishing a nexus between West Virginia and Armco's sales to West Virginia customers sufficient to support imposition of the West Virginia business and occupation tax.

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3 *Amicus* Washington State, on the other hand, concedes that prior decisions of this Court "support the conclusion" that a distinction is to be drawn between the continuous presence of a taxpayer within a state by the maintenance of a local sales office or employment of resident sales personnel, and the mere occasional presence through sporadic use of nonresident solicitors. *Amicus* Br. 10-11. *Amicus* Washington State, however, invites this Court "to re-examine the questions of the constitutional necessity of using an in-state office or resident personnel." *Amicus* Br. 11. Armco agrees that the distinction described by *amicus* Washington State distinguishes this appeal from *Standard Pressed Steel*, but suggests that this distinction is both reasonable and necessary.

Obligation to Withhold Sales or Use Taxes. Appellee's analysis of the decisions of this Court blurs the distinction between the simple nexus sufficient to enable a state to require a seller to withhold sales or use taxes and that necessary to impose a tax on the seller. That analysis would lead one to conclude that any access to the potential market, consisting of a state's inhabitants or their purchasing power, is sufficient constitutional justification for state taxation. That conclusion, however, is drawn from cases involving sales and use taxes imposed by a state on its local inhabitants for the acquisition or consumption of property within the state. In this area a fairly minimal presence of the seller within the state serves to validate the imposition on it of an administrative obligation to act as collector by withholding the sales or use tax imposed upon the local purchaser or user. *See National Geographic Soc'y v. California Bd. of Equalization*, 430 U.S. 551 (1977); *Scripto, Inc. v. Carson*, 362 U.S. 207 (1960). However, recognizing mere access to the state market as adequate for levying gross receipts taxes directly against the seller would be quite a different matter. To do so would sanction what would amount to a state import duty, and so would frustrate the very purposes of the Commerce Clause: to create an area of free trade among the several States (*Commonwealth Edison*, 453 U.S. at 618), and to prohibit the multiplication of preferential trade areas destructive of the free commerce anticipated by the Constitution (*Maryland v. Louisiana*, 451 U.S. 725, 754 (1981)).

Federal Legislation. In the area of apportioned state net income taxes Congress has provided that mere solicitation does not provide a sufficient nexus for state taxation. Interstate Income Tax Act, 15 U.S.C. §§ 381 *et seq.*[4] Nevertheless, Appellee urges that an out-of-state seller, exempted by federal

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4 That legislation arose in reaction to the decision of this Court in *Northwestern States Portland Cement Co. v. Minnesota*, 358 U.S. 450 (1959), where a state tax was upheld because the taxpayers each maintained a small sales office in the taxing state. The opinion in *Northwestern States*, however, acknowledged that "a State 'cannot impose taxes upon persons passing through the state, or coming into it merely for a temporary purpose' such as itinerant drummers." 358 U.S. at 458 (quoting *Robbins v. Taxing District*, 120 U.S. 489, 493-94 (1887)).

legislation from apportioned net income taxes, should be subject to gross receipts taxes based solely upon solicitation within the taxing state. Consider, however, the consequences of adopting that view. If Armco's only activity in West Virginia were solicitation of orders, West Virginia could not under federal law impose a net income tax upon Armco even if it had scores of salesmen continuously soliciting orders in West Virginia and made substantial profits from the resulting sales. On the other hand, under Appellee's constitutional theory, the handful of part-time nonresident salesmen involved here would be sufficient to support a gross receipts tax even if the solicited sales resulted in a net loss. Such an incongruous pattern of taxation would be completely illogical.[5] And while we recognize that legislation cannot be thought to affect the meaning of the Constitution, we submit that the statutory limitation upon state taxation of net income lends support to the conclusion that the traditional requirement of substantial nexus between the transactions taxed and the taxing jurisdiction should not now be relaxed with respect to gross receipts taxes.

Practical Effect of the West Virginia Tax. In line with this Court's admonition to focus on the practical effect of a challenged tax, it is important to consider the revenue producing activities which generated the gross receipts which West Virginia seeks to tax. Within West Virginia one finds only occasional solicitation by nonresidents of some West Virginia customers. Wholly outside West Virginia, however, the orders are received and accepted, raw materials are assembled, and the product itself is manufactured and delivered to a common carrier. Against this background, and claiming that Armco is resisting payment of a "fair share" of West Virginia taxes, the state steps far beyond its boundaries. Pointing only to a very few part-time nonresident salesmen, a constitutional right is

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5 This conclusion is underscored by this Court's observation that a gross receipts tax is "inherently more burdensome" than an apportioned net income tax because the gross receipts tax is applicable "whether or not the interstate concern is profitable and its imposition may make the difference between profit and loss." *Moorman Mfg. Co. v. Bair*, 437 U.S. 267, 281 (1978).

asserted by West Virginia to tax the entire gross receipts resulting from activities carried on by Armco almost entirely without the state. That assertion simply makes no economic sense. And more important, it violates well established constitutional standards. *See Western Live Stock v. Bureau of Revenue*, 303 U.S. 250 (1938); *Gwin, White & Prince, Inc. v. Henneford*, 305 U.S. 434 (1939); *McLeod v. Dilworth Co.*, 322 U.S. 327 (1944). One looks here in vain for any "rational relationship between the sales income attributed to the State and the intrastate values of the enterprise" as required by the Due Process Clause. *Mobil Oil Corp. v. Comm'r of Taxes*, 445 U.S. 425, 436-37 (1980). In short, the practical effect of the tax sought here to be applied to Armco's sales is extraterritorial taxation.

II

DISCRIMINATION AGAINST INTERSTATE COMMERCE

Armco adheres to the view that the West Virginia business and occupation tax under review is discriminatory on its face and contains an intrinsic discriminatory defect.

A. THE TAX IS DISCRIMINATORY ON ITS FACE.

The West Virginia gross receipts tax involved here applies to wholesale sales by manufacturers to West Virginia customers of property manufactured outside the state. It does not apply to identical sales of property manufactured in West Virginia. The situation is just that simple. Legal niceties to one side, on the face of it the local exemption from tax is so clearly discriminatory against interstate commerce that it brings to mind Mr. Justice Stewart's observation that "I know it when I see it." *Jacobellis v. Ohio*, 378 U.S. 184, 197 (1964).

The constitutionally saving grace, according to Appellee and *amicus* Washington State, stems from the fact that West Virginia imposes a gross receipts tax upon its local manufacturers which, obviously, is not imposed on manufacturers operating outside the state. In a broad sense, the argument is that this evens up the interstate score. More specifically, the thought is that because Armco does not have to pay the tax on

manufacturing in West Virginia, it is constitutionally permissible to exempt local manufacturers from the tax on wholesale sales which is imposed upon Armco.[6] In fact, *amicus* Washington State expressly concedes that, but for the alleged requirement that the effect of the taxes on wholesaling and manufacturing be examined together, "an unconstitutional discrimination would unquestionably exist." *Amicus* Br. 16.

Before turning to an analysis of the authorities in this area, we note that taxes are a fact of life in each of the states, and that each of them imposes various types of taxes on manufacturing operations within its borders. Thus, it is not at all surprising that manufacturers in West Virginia are subjected to a tax for which Armco is not liable. It also seems safe to conclude that Armco is subject to taxes outside West Virginia which are not imposed upon West Virginia manufacturers. Far less than clear, however, is what relevance other taxes, whether within or without West Virginia, have in resolving the issue of whether the West Virginia tax on wholesale sales is itself discriminatory.

There are two theories which, if applicable, might make the West Virginia tax on manufacturing relevant to a consideration of the constitutionality of the West Virginia tax on wholesale sales. First, it might be asserted that the tax on wholesale sales complements the manufacturing tax in the same manner that a state use tax complements a sales tax. *See, e.g., Boston Stock Exchange v. State Tax Comm'n*, 429 U.S. 318, 331-32 (1977); *Henneford v. Silas Mason Co.*, 300 U.S. 577, 583-84 (1937); *Gregg Dyeing Co. v. Query*, 286 U.S. 472 (1932). Or second, it might be asserted that a portion of the tax on manufacturing is imposed in respect of an anticipated eventual wholesale sale by the manufacturer of his product and, as a result, in-state manufacturers pay tax on their wholesale sales under the guise of the manufacturing tax provision. For the reasons noted below, neither of these two arguments can be supported here.

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6 Appellee agrees that *Columbia Steel Co. v. State*, 30 Wash. 2d 658, 192 P.2d 976 (1948), invalidated an identical scheme to the one under consideration in this appeal as unconstitutionally discriminatory against interstate commerce. Appellee's Br. 85. Appellee concludes, however, that *Columbia Steel* is, in the words of *amicus* Washington State, "simply wrong." *Amicus* Br. 17 n.12.

1. THE WEST VIRGINIA TAX ON WHOLESALE SALES DOES NOT COMPLEMENT THE TAX ON MANUFACTURING.

Appellee and *amicus* Washington State cite a number of cases involving compensatory taxes where this Court has held that a tax which applied to interstate commerce, but not to intrastate commerce, did not discriminate against interstate commerce because (i) intrastate commerce was subject to a second tax that did not apply to interstate commerce, and (ii) the tax on interstate commerce was intended to complement the local tax. *E.g.*, *Alaska v. Arctic Maid*, 366 U.S. 199 (1961); *Gregg Dyeing Co. v. Query*, 286 U.S. 472 (1932); *Hinson v. Lott*, 75 U.S. (8 Wall.) 148 (1869). These cases are offered as authority for the proposition that because Armco is not subject to the West Virginia tax on manufacturing, the state may properly excuse local manufacturers from the tax on wholesale sales which the state exacts from Armco. That analysis fails, however, because the tax on wholesale sales cannot act to compensate for the effect of the West Virginia manufacturing tax on in-state manufacturers.

Precisely this question was considered in *Maryland v. Louisiana*, 451 U.S. 725 (1981). In that case, Louisiana imposed a use tax (the "First-Use Tax") with respect to gas produced in the federal Outer Continental Shelf ("OCS") and then piped to processing plants in Louisiana. This Court held that the tax violated the Commerce Clause because the effect of various credits and exclusions was to cause the tax to apply to gas sold in interstate commerce but not to gas sold in intrastate commerce. The State of Louisiana argued that gas produced in Louisiana was subject to a severance tax which was not imposed upon gas extracted from the OCS, and that this justified the otherwise discriminatory nature of the First-Use Tax. This Court flatly rejected that argument, pointing out that Louisiana could not impose a severance tax on gas produced outside of Louisiana and, accordingly, a tax on such gas could not be a complement to the severance tax:

> In our view, the First-Use Tax cannot be justified as a compensatory tax. The concept of a compensatory tax

> first requires identification of the burden for which the State is attempting to compensate. Here, Louisiana claims that the First-Use Tax compensates for the effect of the State's severance tax on local production of natural gas. . . . But the First-Use Tax is not designed to meet the same ends since Louisiana has no sovereign interest in being compensated for the severance of resources from the federally owned OCS land. *The two events are not comparable* in the same fashion as a use tax complements a sales tax. In that case, a State is attempting to impose a tax on a *substantially equivalent event* to assure uniform treatment of goods and materials to be consumed in the State. No such equality exists in this instance.

451 U.S. at 758-59 (emphasis added).

The argument here that the tax on wholesaling complements the tax on manufacturing is exactly the same as the unsuccessful argument made by Louisiana. West Virginia is without power to tax the manufacturing activities conducted by a foreign corporation in another state, just as Louisiana was without power to impose a severance tax on gas produced on federal OCS land. Accordingly, a tax on wholesale sales of products manufactured outside West Virginia cannot be viewed as a compensatory tax intended to complement the tax on local manufacturing. Moreover, wholesaling and manufacturing are not "substantially equivalent event[s]" and, as a result, taxes on those activities cannot be viewed to be mutually compensatory. In short, justifying the taxation of Armco's wholesale sales by relying on the fact that Armco is not subject to the West Virginia tax on manufacturing is directly contrary to *Maryland v. Louisiana, supra.*

The requirement of a relationship between those taxes which may properly be viewed together for purposes of determining whether a tax is discriminatory with regard to the economic burdens it imposes was recently underscored in *Washington v. United States*, 103 S. Ct. 1344 (1983). In that case, this Court held that, although separate provisions of a single sales tax scheme should be viewed together in testing for discrimination, "[a] different situation would be presented if a State imposed a

sales tax on contractors who work for the Federal Government, and an entirely different kind of tax, such as a head tax or a payroll tax, on every other business." *Id.* at 1350 n.11. The West Virginia tax on wholesale sales, when compared to the tax on manufacturing, is "an entirely different kind of tax," and it is improper to combine them for purposes of analyzing the discrimination issue.

The compensatory tax cases cited by either Appellee or *amicus* Washington State, *Alaska v. Arctic Maid*, *supra*, *Gregg Dyeing Co. v. Query*, *supra*, and *Hinson v. Lott*, *supra*, may each be distinguished from this appeal under the guidelines of *Maryland v. Louisiana*, *supra*, and *Washington v. United States* because they each involved taxes imposed on comparable, substantially equivalent events.[7]

In *Arctic Maid*, Alaska imposed a four-percent tax on the value of fish taken from Alaskan waters by freezer ships which would transport the fish to the State of Washington for canning. Under another provision of the Alaskan statutes, local canneries (which did not use freezer ships) paid a six-percent tax on the value of salmon obtained for canning. An objection to the four-percent tax applicable to the freezer ships was posed under the Commerce Clause on the ground that it applied only to fish in interstate commerce. This Court upheld the tax, finding that the tax paid by freezer ships complemented the higher tax paid on fish acquired by the Alaskan canneries. The incident of taxation was the same for both in-state and out-of-state processors—the acquiring of the fish to be canned. *Arctic Maid* is entirely consistent with Armco's

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7 Another case cited by Appellee, *Caskey Baking Co. v. Virginia*, 313 U.S. 117 (1941), did not involve a compensatory tax, but is also distinguishable from this appeal. An out-of-state baker which peddled bread in Virginia was required to pay a Virginia license tax of $100 on each vehicle used in the business of peddling. In response to the Commerce Clause challenge to the tax posed by the baker, this Court simply held that because all peddlers, whether resident or not, were subject to the same license tax, there was no violation of the Commerce Clause. In addressing the Commerce Clause issue, no consideration was given to other state taxes on local businesses; rather, those taxes were referenced only in the Court's Equal Protection Clause discussion, which is not relevant to this appeal.

view that the effect of various taxes should be compared only when imposed on "substantially equivalent event[s]."

Gregg Dyeing Co., supra, involved a compensating use tax of the type specifically distinguished in *Maryland v. Louisiana, supra*. And in *Hinson, supra*, Alabama imposed a direct tax of 50 cents per gallon on "spirituous liquors." Under one section of the statute, the tax was paid by in-state manufacturers, and under another section it was paid by dealers on liquor brought into Alabama from other states. This Court held that the tax on imported liquor "was only the complementary provision necessary to make the tax equal on all liquors sold in the State." *Id.* at 153. Thus, those tax provisions were of the type approved in *Maryland v. Louisiana, supra*, and distinguished by that case from taxes imposed upon unrelated events. Because *Hinson* involved a direct tax on property, rather than taxes imposed on specific activities, the complementary provisions clearly shared identical objects of taxation. That case offers no guidance to this appeal, where the objects of the tax are separate and distinct activities and are not substantially equivalent.[8]

2. NO PORTION OF THE TAX ON MANUFACTURING IS IN FACT IMPOSED UPON WHOLESALE SALES.

If some portion of the tax on local manufacturing in West Virginia actually constituted a tax on the sale (rather than the production) of local products, Armco's discrimination argument would be blunted because local manufacturers could then be said to be paying a tax on their wholesale selling activities. However, the tax on manufacturing is simply not in part a tax on wholesale sales. One might as well point to local property taxes in West Virginia to cure the discrimination in the wholesale sales tax.

As a matter of statutory construction, the West Virginia statute itself illustrates clearly that the manufacturers tax is not in lieu of the wholesale sales tax. It is precisely what it says it

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8 *See Walling v. Michigan*, 116 U.S. 446 (1886), confirming that taxes imposed on activities which are not substantially equivalent cannot be mutually compensating.

is—a tax on manufacturing. This is confirmed by the fact that the manufacturing tax must be paid even where there is no local wholesale sale of the manufactured product. For example, the tax on manufacturers applies *in full* to the manufacture of products which are not sold (*e.g.*, where the product is consumed by the manufacturer). In addition, the tax applies *in full* to the manufacture of products sold outside the state (which sales are beyond the state's taxing reach). And finally, local manufacturers must pay the tax on retailing when making sales at retail, notwithstanding the requirement that the tax on manufacturing must also be paid *in full* in respect of the product sold. *See* Appellant's Br. 23-24. If there were any merit to the assertion that the tax on manufacturing should be viewed in part as a tax on wholesale sales, the manufacturing tax would have to be reduced where the product is not sold at wholesale within West Virginia. There is no such reduction.

The shortcoming of all of the arguments advanced to support Appellee's position is that they never come to grips with the fact that the tax on wholesale sales is imposed on a wholly different activity from the tax on manufacturing. That fundamental difference precludes the former tax from complementing the latter and precludes the conclusion that in part the tax on manufacturers is imposed with respect to wholesale sales.

B. THE TAX CONTAINS AN INTRINSIC DISCRIMINATORY DEFECT.

Appellee's brief offers no response to Armco's argument that the exemption of local manufacturers from the tax on wholesale sales causes the West Virginia tax system to be intrinsically discriminatory against interstate commerce. *Amicus* Washington State takes up this argument, but concludes that it is essentially the same as a multiple taxation theory and discusses it in that context. There is, however, a basic distinction between a multiple taxation problem and the argument Armco makes here.

A multiple taxation theory proceeds from the argument that more than one jurisdiction is taxing the same activity or event. The complaint engendered in such cases is that two states exact

(in respect of a single activity or event) an aggregate tax which is constitutionally burdensome. Armco does not contend here that it is subject to impermissible multiple taxation. Rather, it does claim that the West Virginia scheme of taxation contains an intrinsic defect which causes it to favor intrastate commerce.

If, as the Appellee asserts, the West Virginia tax on wholesale sales were not discriminatory, then clearly other states would be free to adopt an identical system of taxation. Analysis of what would happen, however, if even one other state were to adopt the West Virginia scheme of taxation confirms that the West Virginia tax contains an intrinsic defect that makes it necessarily discriminatory. That defect can be illustrated by hypothesizing the existence of a second state with a tax system identical to that of West Virginia. The result would be that all wholesale sales in one of the states by manufacturers operating in the other state would result in a greater total tax than similar transactions involving only one of the states. This result, however, does not stem from multiple taxation by the two states. Indeed, one state would tax manufacturing and the other wholesale selling—a situation which establishes no claim of multiple taxation. Rather, the discrimination demonstrated is the consequence of the favoritism shown to intrastate commerce by forgiving the tax on wholesale sales if (and only if) manufacture and sale both take place in the same state.

The distinction between the intrinsic defect Armco identifies here and a multiple taxation problem is that the latter, as pointed out by *amicus* Washington State, is ordinarily the product of interaction between two *differing* tax statutes, and culpability often cannot be attributed to one or the other system.[9] Where the statutes of both states are identical, how-

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9 For that reason, and because it is often easy to hypothesize a second tax system (unrelated in operation to one being reviewed) which would result in multiple taxation in conjunction with a system under review, this Court has declined to examine multiple taxation questions in the absence of a demonstration of multiple taxation in fact. *See Standard Pressed Steel, supra*; *General Motors Corp. v. Washington*, 377 U.S. 436 (1964). Those difficulties are not presented, however, where the hypothetical second system is identical to the one under review.

ever, the defect is clearly intrinsic to the single system that has been duplicated, and that defect causes the system to fail the standard of "internal consistency" articulated in *Container Corp. of America v. Franchise Tax Bd.*, 103 S. Ct. 2933, 2942 (1983).

It should be noted that the defect complained of by Armco arises out of the wholly intrastate operation of the West Virginia tax—that is, out of the local manufacturer exemption from the tax on wholesale sales. Consequently, although hypothesizing an identical tax system in a second state makes it easier to illustrate the discriminatory effect of the West Virginia scheme, such a second system is not required to produce the discrimination protested by Armco. The internal consistency standard requires reference to a hypothetical second state tax system merely to test for the discriminatory characteristic; failure to meet that standard, however, does not in any way depend upon the existence of an identical scheme in another state.

Thus, the objection of *amicus* Washington State that Armco's argument is merely hypothetical is not well taken. The concerns that have caused this Court to require a showing of actual multiple taxation are not present where the defect complained of does not involve multiple taxation and is intrinsic to the system under review. Moreover, because the favoritism toward intrastate commerce identified by Armco is intrinsic to the West Virginia scheme and results from wholly intrastate transactions, the harmful discrimination against Armco's interstate commerce with West Virginia obtains without regard to whether there actually exists a second state which imposes identical taxes.

CONCLUSION

Constitutional limitations on the power of the states to tax multistate businesses have consumed a significant amount of this Court's time in recent years. The result, however, has been that in the area of net income taxes we have arrived at workable rules which achieve at least rough justice in the large majority of cases. Although controversy still surrounds foreign

aspects of the unitary business theory, on the domestic level the theory works well in segregating the total net income to be taxed. And apportionment formulas, although not entirely uniform, in general work well in apportioning total net income among the various states. No such constitutional progress, however, has been made in the area of gross receipts taxes.

This case presents this Court with an opportunity to define fair and practical constitutional guidelines governing gross receipts taxation. Armco urges the Court to seize that opportunity. Further, Armco submits that the unitary business theory should be found to have no application to gross receipts taxes. The rule dictated by precedent, and by an equal regard for the financial needs of states and taxpayers alike, is that a transaction subject to gross receipts taxation must arise in the context of a substantial permanent presence within the taxing jurisdiction. Mere solicitation should be declared insufficient, and the decision of the Court below should accordingly be reversed.

Alternatively, if this Court finds that sufficient nexus exists here to justify the gross receipts taxes at issue, the decision of the Court below should nonetheless be reversed because the West Virginia tax on the gross receipts from wholesale sales discriminates against interstate commerce in violation of the Commerce Clause.

Dated: March 22, 1984

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No. 83-297

IN THE

Supreme Court of the United States

OCTOBER TERM, 1983

ARMCO, INC.,

Appellant

v.

DAVID C. HARDESTY, JR.,
STATE TAX COMMISSIONER OF WEST VIRGINIA,

Appellee

On Appeal from the Supreme Court of Appeals of West Virginia

BRIEF FOR THE NATIONAL CONFERENCE OF STATE LEGISLATURES, THE COUNCIL OF STATE GOVERNMENTS, THE NATIONAL LEAGUE OF CITIES, THE INTERNATIONAL CITY MANAGEMENT ASSOCIATION, AND THE NATIONAL ASSOCIATION OF COUNTIES AS AMICI CURIAE IN SUPPORT OF THE APPELLEE

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QUESTION PRESENTED

Whether it is constitutional for a state to tax sales to in-state customers by large companies that conduct extensive in-state marketing activities which give rise to the very sales being taxed, and that also perform other crucial aspects of their integrated operations within the state.

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INTEREST OF THE AMICI CURIAE

The *amici* are organizations that represent state and local governments located throughout the United States. *Amici* and their members have a vital interest in legal

questions affecting such governments. This case presents an issue of great importance concerning the taxing authority of state governments. For it raises the question whether a state may tax sales to in-state customers by companies that conduct extensive in-state marketing activities which give rise to the very sales being taxed, and that also perform other crucial aspects of their integrated operations within the state.

In prior cases this Court has recognized that "interstate commerce must pay its way," by bearing its fair share of local tax burdens, when companies involved in such commerce engage in business activity within a state and enjoy benefits and protections provided by the state. Continued adherence to this established principle is crucial in this case. There are two reasons.

First, it has become common for companies to do business within a state by engaging there in significant activities which create a market for the companies' products, or by performing other crucial aspects of integrated operations there. By doing business within a state in these ways, companies secure the benefits and protections offered by the state.

Second, financially hard-pressed states must have access to justified sources of revenue necessary to fund the very benefits and protections obtained by companies which do business within their borders. If a state cannot tax sales to in-state customers when market-creating or other vital activities are performed in-state, then it will be denied essential revenues. Concomitantly, large national companies will be able to engage in extensive in-state activities, and obtain benefits and protections from the state, without paying their appropriate share of state taxes.

Thus, a ruling that a state can tax in-state sales stemming from in-state activities is necessary to avoid imposing an unfair fiscal burden on state governments. *Amici*

are therefore submitting this brief to assist the Court in its consideration of this litigation.[1]

STATEMENT OF THE CASE[2]

1. Armco, Inc., is a vertically integrated Ohio corporation that does business in West Virginia and other states (App. 3a). It is engaged in the business of manufacturing and selling steel products (*id.* at 39a). For this purpose it mines coal, manufactures steel, fabricates finished steel products, and distributes the products to wholesalers and end users (*id.* at 3a-4a; 39a). It has at least four mines in West Virginia at which it extracts, cleans and processes the coal used in the manufacture of its steel (*id.* at 3a). Its finished products are sold to customers located in West Virginia and elsewhere (*id.* at 3a-4a).

Armco is organized into divisions, including the Mining Division, the Steel Group, the Union Wire Rope Division, and the Metal Products Division. Various divisions conduct sales, promotional and marketing activities within West Virginia (App. 3a-4a). The Steel Group promotes sales of its products to West Virginia customers by sending each of four salesmen into West Virginia on virtually a monthly basis to solicit orders from customers located in the state. The salesmen are available to give advice concerning Armco's line of products and to make recommendations regarding a customer's needs. They tailor orders to the customer's specifications and forward the orders to Armco's offices. They make follow-up calls on customers to check whether the products have been satisfactory, and occasionally investigate complaints and service the products (*ibid.*).

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[1] Pursuant to Rule 36, the parties have consented to the filing of this *amicus* brief. Their letters of consent have been lodged with the Clerk of the Court.

[2] References to the Appendix filed with Appellant's Jurisdictional Statement shall be noted as App. ——.

The activities of the Union Wire Rope Division in West Virginia are similar. It has three salesmen who visit West Virginia customers once or twice a month to solicit orders. The salesmen make follow-up calls to check customer satisfaction, investigate complaints, and service products (App. 4a).

The Metal Products Division maintains an office at South Charleston, West Virginia, where it employs two sales engineers (App. 4a). This office solicits the sale in West Virginia of all of the division's products except metal buildings. Such buildings are sold by Armco franchisees who reside in West Virginia and are authorized to use the corporation's name, trademarks and advertisements (*ibid.*). Armco shares advertising expenses with the local franchisees, and the franchisees and Armco have agreed to close cooperation for the "development and mutual growth of their individual businesses" (App. 4a; 49a).

2. West Virginia imposes a business and occupation tax of .88 percent on the value of tangible property manufactured within the state. It also imposes a business and occupation tax at the much lesser rate of .25 percent upon gross receipts realized from wholesale sales of tangible property by persons doing business within the state. The wholesale sales tax is forgiven if the taxpayer has previously paid the manufacturing tax, whose percentage rate is, of course, three and one half times that of the wholesale sales tax (App. 19a-20a).

3. This case arises out of Armco's failure to pay the appropriate amount of tax during a six-year period, 1970-1975. During that time Armco understated and failed to pay taxes due on its coal operations in West Virginia, and failed to pay any tax on sales made to West Virginia customers by its Steel Products Group, its Union Wire Rope Division, and the metal buildings subgroup of its Metal Products Division (App. 38a-39a).

The Tax Commissioner of West Virginia issued on assessment against Armco for the taxes owing. At a hearing, Armco conceded it owed certain portions of the tax on its coal operations and was found to owe other portions (App. 39a; 44a-47a). However, it claimed the state could not tax the sales made to West Virginia customers by the Steel Group, the Union Wire Rope Division, or the metal buildings subgroup (*id.* at 47a-49a).

The hearing examiner rejected Armco's claim, ruling that West Virginia can tax these sales because there is a nexus with the state. In this regard, the examiner found that salesmen for the Steel Group and the Union Wire Rope Division carry on marketing activities within the state in "a systematic and repetitive manner", and that such activities are "crucial to the development and maintenance of a market for the taxpayer's product in this state" (App. 48a). He also pointed out that the metal buildings subgroup uses and engages in activities with local franchisees, and found that these actions are "designed to hold a market for the taxpayer's product" by insuring that the franchisees have a resale market (*id.* at 49a).

Armco thereafter appealed to a state trial court which overturned the prior decision. It ruled that the sales by the Steel Group, the Union Wire Rope Division and the metal buildings subgroup were not taxable because there was not a sufficient nexus with the state (App. 26a-31a).

The state then took the case to the West Virginia Supreme Court, which reversed the trial court. The state supreme court held that Armco's divisions are part of "a unitary business corporation conducting its business activity under one corporate umbrella," and ruled that Armco's in-state sales and coal mining activities establish a nexus with the state that justifies imposition of the tax (App. 14a-15a).

The state supreme court also concluded that, because the tax is assessed in proportion to Armco's activities in

West Virginia, it is fairly apportioned and bears a rational relationship to the services and benefits conferred upon Armco by the state (App. 15a-19a).

Finally, the court ruled that the wholesale sales tax does not discriminate against out-of-state manufacturers. Rather, when West Virginia's tax laws are viewed as a whole, out-of-state manufacturers who make wholesale sales to West Virginia customers, and pay the wholesale sales tax, bear a lighter tax burden than in-state manufacturers who pay the manufacturing tax (App. 19a-23a).

SUMMARY OF ARGUMENT

I.

A. West Virginia possesses the constitutional power to tax Armco's wholesale sales to customers located in the state. For there is a nexus with the state and Armco receives protection and benefits from the state.

A nexus exists because Armco engages within the state in a host of purposive revenue generating activities that create the very sales being taxed. These activities include regular and frequent visits to customers by Armco salesmen to solicit sales and follow-up afterwards. They also include the presence and activities of Armco's local franchisees.

Armco obtains benefits and protections from West Virginia because of the in-state presence and activities of its salesmen, franchisees, and coal mines. It uses the state's roads, receives police and fire protection, has access to local courts to enforce its contracts, and secures the advantages of state laws and policies that foster a business climate in which there is a market for its products.

B. West Virginia's power to tax Armco's wholesale sales to in-state customers is dispositively supported by this Court's decision in *Standard Pressed Steel Co. v. Washington Department of Revenue*, 419 U.S. 560

(1975). In that case a tax imposed by Washington on a Pennsylvania company was upheld because the taxpayer had one employee who, working out of his home, consulted with the taxpayer's lone Washington customer to determine the latter's anticipated needs and follow up on any difficulties. The Court ruled the tax constitutional because the employee "made possible the realization and continuance of valuable contractual relations" between the taxpayer and the customer. 419 U.S. at 562. Here Armco's numerous salesmen and franchisees likewise "ma[k]e possible the realization and continuance of valuable contractual relations" between Armco and customers.

The only difference in the two cases is that the lone employee in *Standard Pressed Steel* lived in Washington, whereas here Armco's numerous salesmen (though not its franchisees) live out-of-state. But their place of residence is irrelevant because their activities occur within West Virginia and Armco obtains benefits and protection from the state.

C. Sound reasons of public policy also support West Virginia's authority to tax Armco's sales. Face to face sales efforts intended to generate a market for a producer's goods are a vital component of modern business practice, and are engaged in by tens of thousands of companies. If a state cannot tax the sales to local customers generated by such in-state sales efforts, then one of the major activities of modern business will not serve as a basis for taxation of business.

Preclusion of this basis of taxation would be as wrong in principle as precluding manufacturing from being a basis of taxation, since both activities are major components of the commercial and industrial process. Preclusion would also cause financially hard pressed state governments to be cut off from a well justified source of revenue.

D. Armco's wholesale sales to West Virginia customers can also be taxed because Armco is a unitary, vertically

integrated business enterprise whose ultimate goal is the sale of finished steel products. One of the major components of this unitary enterprise—the mining and processing of coal—occurs within West Virginia, and the state can therefore tax the sale to West Virginia customers of the end product of the unitary enterprise. The state is merely taxing the in-state consummation of a unitary series of activities that in important part occurred within the state.

II.

A. Armco claims that West Virginia's wholesale tax discriminates against interstate commerce. The claim is wrong. The state's tax is a fair and non-discriminatory one which comports with decisions of this Court. To the extent it gives an advantage to anyone, the advantage goes not to in-state manufacturers who sell to West Virginia customers, but to companies like Armco which manufacture products out-of-state and sell them to customers located in West Virginia.

Well established principles govern Armco's claim of discrimination. To begin with, the Court has repeatedly ruled that, in considering a claim of discrimination, the state's whole scheme of taxation must be taken into account. The Court has also held that a claim of discrimination must be judged on a practical dollars and cents basis, not on the basis of legal abstractions. In this regard it has pointed out that a party is not the victim of discrimination when it is better off than other taxpayers because it pays the state less tax than they. Finally, the Court has ruled that, when a taxpayer claims discrimination, it bears the "distinct burden" of proving the claim by "clear and cogent evidence." *Container Corporation of America v. Franchise Tax Board*, —— U.S. ——, ——, 103 S.Ct. 2933, 2939-40 (1983).

Under these principles, West Virginia's tax is plainly nondiscriminatory and constitutional. The state imposes a tax at the rate of .88 percent on the manufactured value of products made in the state, and a tax at the far

lower rate of .25 percent on tangible goods sold at wholesale to West Virginia customers. The wholesale tax is forgiven if the goods were manufactured in-state and subjected to the manufacturing tax.

Because the wholesale tax is assessed at a far lower percentage rate than the manufacturing tax, an out-of-state producer such as Armco, which is subject to the wholesale but not the manufacturing tax, will normally pay less money to the state than would be paid if its goods were produced in-state and subjected to the manufacturing tax but not the wholesale tax. Thus, when the system is viewed as a whole, companies like Armco which manufacture products out-of-state will normally be better off on an actual dollars and cents basis than if their goods were made in-state.

Armco has not even alleged, let alone tried to prove by clear and cogent evidence, that the actual facts of the case are any different than this. Thus it has not even claimed it pays more tax to the state under the .25 percent wholesale tax rate than would be paid under the .88 percent manufacturing tax rate.

Nor has Armco even alleged, let alone tried to prove, that in actual fact it suffers discrimination because of the combined effects of the West Virginia wholesale tax plus some manufacturing tax in Ohio, where it produces its goods. In other words, it has not even claimed that, because of any such combined effect, it in fact pays a greater sum in total manufacturing and wholesale sales taxes than would be paid if its goods were manufactured in West Virginia. Rather than even allege this, it merely presents hypothetical speculations on what the situation *might* be *if* Ohio imposed a tax. But hypothetical speculations are not the "clear and cogent evidence" required for a taxpayer to carry its "distinct burden" of proving unconstitutional discrimination. Were it otherwise, the taxing power of financially hard pressed states would be crippled by hypothetical arguments lacking any basis in fact.

ARGUMENT

I. WEST VIRGINIA POSSESSES THE CONSTITUTIONAL POWER TO TAX ARMCO'S WHOLESALE SALES TO CUSTOMERS LOCATED IN WEST VIRGINIA

A. A State Can Impose a Tax Where the Requisite Nexus Exists And the Taxpayer Is Obtaining Benefits From the State

The question in this case is whether West Virginia can tax wholesale sales made by Armco to customers located within the state. The question turns on two interrelated principles established in this Court's decisions on whether state taxes are lawful under the interstate commerce and due process clauses. The first is that a state can tax a company's in-state sales when there is an appropriate nexus between the state on the one hand and the company and its activities on the other. *E.g., Standard Pressed Steel Co. v. Department of Revenue of Washington*, 419 U.S. 560, 562-563 (1975). The second is that, when it engages in commercial activity within a state and benefits from the advantages offered by the state, " 'even interstate commerce must pay its way' by bearing its share of local tax burdens." *Gwin, White & Prince v. Henneford*, 305 U.S. 434, 438 (1939), quoting *Postal Telegraph-Cable Co. v. Richmond*, 249 U.S. 252, 259 (1919). In this case both of these interrelated principles are easily satisfied.

B. The Requisite Nexus Exists Because Armco Engages In Purposive Revenue Generating Activities in West Virginia, Activities Which Create the Market for the Products It Sells to Customers Within the State

In this case Armco engages in a host of purposive revenue generating activities within West Virginia. These activities prominently include regular, frequent and active solicitation by Armco salesmen of the very sales the state is taxing. By means of such solicitations, which are essential in selling steel products, Armco is physically

present in and doing business in West Virginia for the purpose of systematically creating a market for its goods. Armco's activities in West Virginia thus create the nexus necessary to support taxation.

Armco's Steel Division sends each of four salesmen into the state on virtually a monthly basis to solicit sales which are the subject of the West Virginia tax. In addition representatives from the Steel Division investigate complaints and occasionally perform service work in connection with the Division's products. The Union Wire Rope Division also sends its salesmen into the state to solicit orders: three salesmen visit customers in West Virginia once or twice a month for this purpose. These salesmen also follow up the sales to verify customer satisfaction with the products.

The Metal Products Division, which maintains a West Virginia office with salemen who visit customers located throughout the state, sells its metal buildings through local franchisees whom it has licensed to use the corporate name, trademarks and advertising, and with whom it shares advertising expenses. It also cooperates closely with these franchisees in order to strengthen the sale of its products.

In these ways Armco is physically doing business in West Virginia for the purpose of generating the sales which are the subject of the tax. In addition, Armco engages in major in-state activities which are essential to its ability to manufacture the products it sells to West Virginia customers. Specifically, it mines, cleans and ships huge amounts of West Virginia coal which it uses to make the steel for the products it sells to customers in the state.

C. Armco Obtains the Benefits and Protection Offered by the State

By virtue of its regular frequent presence in West Virginia to generate sales, its presence there through franchisees licensed to use its marks and advertising, and its

extensive activities relating to coal, Armco obtains the benefits and protection offered by the state. It uses the state's roads, is protected by the state's police and fire departments, has access to the state's courts to enforce its contracts, and secures the advantages offered by state laws and policies which foster a business climate in which steel products are sold. In paying a wholesale tax on sales to West Virginia customers, Armco is simply paying a very small share of the taxes necessary to support the benefits it obtains.

D. The West Virginia Tax Is Constitutional Under This Court's Decision In *Standard Pressed Steel Co. v. Washington Department of Revenue*

The decision of this Court in *Standard Pressed Steel Co. v. Washington Department of Revenue, supra*, lends dispositive support to West Virginia's position. For *Standard Pressed Steel* establishes that a state can levy a gross receipts tax when in-state activities contribute to the sales on which the tax is imposed.

In the *Standard Pressed Steel* case, the state of Washington levied a gross receipts tax on sales of aerospace fasteners by the taxpayer to its sole Washington customer, the Boeing Company. The taxpayer, Standard, had no office in Washington, and Boeing sent orders directly to Standard's out-of-state home office. The orders were also filled out-of-state, with the product being sent directly to Boeing via common carrier. Payment was made directly to Standard. Standard's commercial interests with Boeing were looked after by an in-state employee, one Martinson, who operated out of his home. This employee "consult[ed] with Boeing regarding its anticipated needs and requirements for aerospace fasteners and . . . follow[ed] up any difficulties in the use of appellant's product after it was delivered." 419 U.S. at 561.

In these circumstances, Standard argued that the tax on its gross receipts was unconstitutional because its

contacts with Washington were "so thin and inconsequential" that the tax had "no reasonable relation to the protection and benefits conferred by the taxing state." 419 U.S. at 562. The Court, however, thought the taxpayer's argument "verge[d] on the frivolous" because Martinson's activities within the state "made possible the realization and continuance of valuable contractual relations between [Standard] and Boeing." *Ibid.*

The present case is virtually identical to the *Standard Pressed Steel* case. For the activities of Armco salesmen and franchisees within West Virginia "ma[ke] possible the realization and continuance of valuable contractual relations" between Armco and its customers. The only difference in the two cases is that Standard's single relevant employee lived in Washington, whereas Armco's numerous relevant salesmen live outside West Virginia but enter it on a regular and frequent basis to discuss customers' needs, to take orders, and to follow up afterwards. (Armco's franchisees, of course, live in-state, as did Martinson.) But the salesmen's places of residence are irrelevant. For their pertinent *activities* occur within West Virginia and Armco thereby obtains the "protection and benefits conferred by the taxing state."

Armco, however, asserts that the decision in *Norton Co. v. Department of Revenue*, 340 U.S. 534 (1951), precludes imposition of West Virginia's tax. The same argument was made in *Standard Pressed Steel*, where the Court noted that "[m]uch reliance is placed on *Norton*." 419 U.S. at 562. The argument was rejected in *Standard Pressed Steel* and should be rejected here. As the Court pointed out in *Standard Pressed Steel*, the nontaxable sales in *Norton* involved orders that were sent directly from in-state customers to an out-of-state seller, were filled out-of-state, and were shipped directly to the customer. *Ibid.*; see *Norton*, *supra*, 340 U.S. at 538. Thus, there was no local in-state activity that could be the basis for a tax on these sales. Here, of course, the situation is

far different. For here Armco's salesmen and franchisees engage in regular and frequent in-state activities that serve as a predicate for the tax on the wholesale sales.[3]

E. Public Policy Supports the West Virginia Tax

Sound reasons of public policy support the principle, applied in *Standard Pressed Steel* and applicable here, that a state can tax sales to customers located within its boundaries when a company engages there in activities which generate the very sales being taxed.

Face to face sales efforts which generate a market for a producer's goods are not some trivial or incidental activity in the business world. Rather, they are a vital component of the crucial marketing efforts of scores of thousands of companies. They are, in fine, one of the major ways in which business is done. They are especially important to wholesale sales of industrial products, the type of sales being taxed here.

Because face to face sales and marketing efforts are crucial, and because of the ease of modern transportation, untold thousands of salesmen continuously and systematically visit "foreign" states of the Union to promote and secure orders for products. By virtue of their regular visits, their companies secure the benefits and protections offered by each of the "host" states, benefits and protections which are the same as those secured by Armco in this case. If the host states cannot tax sales

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[3] This case is also much different from the old "drummer" cases. In those cases, as pointed out in *Norton*, the taxpayer could be viewed as "remote and inaccessible," and could not be reached with process for breach of contract or defective goods. 340 U.S. at 538. Armco is not remote and inaccessible. Rather it is continuously present at its customers' West Virginia premises through the regular visits of its salesmen, is also present in West Virginia through its licensed franchisees, and is present in the state through its coal mines. Furthermore, because of its presence in West Virginia, it can be reached with process.

generated by the in-state efforts of the salesmen, then one of the major commercial and industrial activities of modern American business will not serve as a basis for the exercise of a state's power to tax business.

To preclude in-state sales and marketing activities from being a basis of taxation would be as wrong in principle as precluding manufacturing from being a basis of taxation. The one, no less than the other, is a major component of the industrial and commercial process. In addition to being wrong in principle, the preclusion would be detrimental to the ability of state governments to raise the monies necessary to support the very benefits and protections offered to companies that send salesmen into the states to secure business. State governments, already hard pressed financially, would be cut off from a significant source of well justified tax revenues. Concomitantly, huge corporations could engage in extensive in-state activities to obtain business but would not have to pay any tax on the in-state sales secured thereby.[4]

Finally, local businesses would be subjected to a severe competitive disadvantage. For a local business would be subject to its state's sales tax, but a "foreign" business would not be.

F. West Virginia's Tax on Sales to West Virginia Customers Is Constitutional Because Armco Is a Unitary Enterprise Which Performs a Crucial Aspect of its Integrated Business Activities Inside the State

The foregoing establishes that West Virginia can tax Armco's wholesale sales to West Virginia customers because Armco engages in revenue generating in-state activities which create the very sales being taxed, and obtains benefits and protections from the state. There is

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[4] To insure nontaxability, corporations would engage in evasive devices such as formally accepting orders in another state and having title pass elsewhere than in the buyer's state.

also an additional reason why West Virginia can tax sales to in-state customers: Armco is a unitary business enterprise with major components located in the taxing state.

The unitary nature of Armco's overall enterprise is demonstrated by the fact that Armco is a vertically integrated company. It mines coal, uses the coal to manufacture steel, uses the steel to fabricate steel products, and distributes the products to wholesalers and users. Armco's degree of vertical integration is such that its various activities are not even organized into separate corporations. Rather, the foregoing activities are carried out by a single corporation with a number of divisions.[5]

The point of the entire overall enterprise, of course, is to sell the fabricated end products. Armco makes such sales to customers located in West Virginia, a state where it engages in the coal mining that forms a basic link in the chain of vertically integrated activities that are consumated by the customer's purchase of the end product.[6] When a crucial link in the enterprise occurs in-state, the state can tax an ultimate sale to a customer who is also located in-state. For the state is doing no more than taxing the in-state consummation of a unitary series of activities that in important part occurred within the state. *Container Corporation of America v. Franchise Tax Board*, —— U.S. ——, 103 S. Ct. 2933, 2940, 2941 (1983) (A state may tax a unitary business if "at least some part of it is conducted in the state").

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[5] Because it is vertically integrated, Armco obtains the benefits of "an umbrella of centralized management and controlled interaction." *Exxon Corporation v. Wisconsin Department of Revenue*, 447 U.S. 207, 224 (1980).

[6] Armco's West Virginia coal mining receives the same benefits and protection from the state as do its other activities within West Virginia. That is, it receives the benefits of roads, courts, police and fire protection and so forth.

Indeed, the permissibility of taxing the in-state sales of a unitary business in these circumstances follows *a fortiori* from this Court's decision in the *Container* case. There California was permitted to levy a tax on income earned outside the state by means of activities and assets located outside the state. Here West Virginia is taxing only the receipts from sales made to customers *inside* the state, and the coal mining on which the taxation can be premised also occurred inside the state.

II. THE WEST VIRGINIA SYSTEM OF TAXATION IS FAIR AND NONDISCRIMINATORY

A. Introduction

Armco claims that the West Virginia system of taxation discriminates against interstate commerce. This is not true. The West Virginia tax system is a fair, reasonable, and nondiscriminatory one which comports with decisions of this Court. Moreover, to the extent that it may give an advantage to anyone, the advantage goes not to in-state manufacturers who sell to customers within the state, but to companies like Armco which manufacture out-of-state and sell to customers in West Virginia. If anything, therefore, the Washington system *favors* interstate commerce instead of discriminating against it.

B. Well Established Principles Govern Armco's Claim

Armco's claim of discrimination is governed by well-established principles laid down by this Court. To begin with the Court has repeatedly ruled that, in considering a claim of discrimination, a "proper analysis must take 'the whole scheme of taxation into account. . .'" *E.g.*, *Halliburton Oil Well Co. v. Reily*, 373 U.S. 64, 69 (1963) (citations omitted). This was reiterated as recently as last term, when the Court said a determination whether a tax is discriminatory "requires 'an examination of the whole tax structure of the state'." *Washington v. United States*, —— U.S. ——, 103 S.Ct. 1344, 1348 (1983).

Furthermore, when considering whether a tax is discriminatory, "equality . . . is measured in dollars and cents, not legal abstractions." *Halliburton Oil Well Co. v. Reily, supra*, 373 U.S. at 69-70. Thus, regardless of abstract contentions, a party is not the victim of prohibited discrimination when it is "*better off* than other taxpayers because [it] pay[s] less tax than anyone else in the state." *Washington v. United States, supra*, —— U.S. at ——, 103 S. Ct. at 1348 (emphasis in original).

Finally, a taxpayer cannot prevail on a claim of discrimination unless it carries "the distinct burden of showing by 'clear and cogent evidence' " that a tax is unconstitutional. *Container Corporation of America v. Franchise Tax Board, supra*, 103 S.Ct. at 2939-2940 (citations omitted). The taxpayer cannot succeed by merely "showing a fair difference of opinion which as an original matter might be decided differently." *Norton, supra*, 340 U.S. at 380.

C. The West Virginia Tax System Is Lawful Under the Foregoing Principles

Under these governing principles the West Virginia tax system is plainly constitutional. West Virginia imposes a manufacturing tax at the rate of .88 percent on goods produced in the state. It also imposes a wholesale sales tax at the far lower rate of .25 percent on tangible goods sold at wholesale to West Virginia customers. The latter tax is forgiven, however, if the goods were manufactured in the state and the manufacturing tax is paid on them.

When considered as a whole, the system does not discriminate against interstate sellers like Armco, who manufacture their goods out-of-state and sell them to West Virginia customers. Rather, on a practical dollars and cents basis, such sellers will normally pay less tax than is paid when goods are manufactured within the state.

Because the tax rate on wholesale sales is far less than the rate on in-state manufacturing, the actual tax paid on goods manufactured elsewhere but sold in West Virginia will be less than the amount paid on goods manufactured within the state unless the wholesale price of the "foreign" goods is more than 350 percent higher than the manufactured value of the "local" goods. If a product manufactured within the state has a manufactured value of $1,000, the manufacturing tax, imposed at a rate of .88 percent, will be $8.88. If the product is produced elsewhere but is sold in West Virginia, the wholesale sales tax will be less than $8.88 unless the wholesale price of the product is more than $3,500,[7] *i.e.*, is more than 350 percent of its manufactured value.

It is a rare situation, however, when the wholesale price of a product is more than 350 percent of its manufactured value. Moreover, under the statute it will often be impossible for such a case to arise, and it appears to be impossible with regard to the Armco sales at issue here. For the statute provides that the manufactured value of a product is "the gross proceeds derived from the sale thereof by the manufacturer." W.Va. Code § 11-13-2b. Such sales may themselves be wholesale sales, as Armco's are here, and in such instances the manufactured value and the wholesale sales price are one and the same.

Thus, far from discriminating against an interstate seller such as Armco, on its face the West Virginia statute favors such a seller on a dollars and cents basis. For such seller will generally pay less tax to the state than would be paid if goods were manufactured within West Virginia. Nor has Armco even *alleged* (let alone tried to prove by clear and cogent evidence) that the actual facts of the present case are any different than this. That is, Armco has not even alleged that it pays

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[7] .25 times 3500 equals $8.75.

more tax to the state under the .25 percent wholesale tax rate than would be paid under the .88 percent manufacturing rate.

Nor has Armco even alleged, let alone tried to prove, that in actual fact it suffers discrimination because of the combined effect of the West Virginia wholesale sales tax plus a manufacturing tax in Ohio, where it produces its goods. Armco has not claimed that, because of the West Virginia wholesale sales tax plus an Ohio tax, it in fact pays a greater combined sum in manufacturing and wholesale taxes than would be paid if its goods were manufactured in West Virginia. Rather than even claim this to be the actual fact, it simply presents hypothetical and speculative possibilities concerning what the situation *might* be *if* Ohio had a tax. But hypothetical and speculative possibilities, with no apparent basis in fact, are not "clear and cogent evidence" and do not meet the taxpayer's "distinct burden" of showing by evidence that a tax is unconstitutional. Were the situation otherwise, the essential taxing power of states which are hard pressed financially would be crippled by hypothetical arguments lacking any factual basis.[8]

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[8] We note that, just as Armco's claim of discrimination is hypothetical and without factual basis, so too is any possible claim of lack of apportionment. For there is neither allegation nor proof that any state other than West Virginia is taxing Armco's wholesale sales to West Virginia customers. Allegation and proof are missing though the taxpayer, of course, has the burden of establishing failure of apportionment. *Standard Pressed Steel Co. v. Washington Dept. of Revenue, supra*, 419 U.S. at 563. In any event, a claim of lack of apportionment would be specious because West Virginia's tax is " 'apportioned exactly to the activities taxed'," *i.e.*, to sales to customers in West Virginia. *Ibid.*, quoting *Gwin, White & Prince v. Henneford, supra*, 305 U.S. at 440.

We also note that, if situations were to arise in which *actual* problems of discrimination or lack of apportionment were presented by the combined effects of taxes imposed by two or more states, the problem could be solved in a less drastic and crippling fashion than completely overturning the state taxes. One less drastic solution would be for one or more of the involved states to forgive or remit a portion of the tax otherwise owing.

D. The Validity of West Virginia's Tax System Is Supported by Decisions of This Court

Finally, the valid and nondiscriminatory nature of the West Virginia tax system is demonstrated by prior decisions of this Court upholding similar systems of taxation. In *Caskey Baking Co. v. Virginia*, 313 U.S. 117 (1941), the State of Virginia imposed a license tax on each vehicle used in the business of selling goods or merchandise in the State. However, the license tax did not apply to local manufacturers who paid a tax on their capital, or to local distributors with a fixed place of business who paid a state tax on their purchases.

The tax was challenged as discriminatory by an out-of-state producer, but was upheld by this Court. The Court pointed out that the license tax was a component of a comprehensive scheme of taxation under which the parties exempted from the license tax paid other taxes to the state. The Court also noted that, if out-of-State sellers were not subject to the tax, they would be the only sellers in Virginia to escape some form of taxation. 313 U.S. at 120-121.

The same factors are present here. West Virginia has an overall scheme of taxation; parties exempted from the wholesale sales tax pay other taxes; and if out-of-state manufacturers are not subject to the wholesale tax on sales to West Virginia customers, then such manufacturers will escape taxation in the state while in-state manufacturers will be required to pay tax.

Alaska v. Arctic Maid, 366 U.S. 199 (1961), also supports the West Virginia tax. In that case the state imposed a four percent tax when fish were "obtained for processing through freezing." 366 U.S. at 200. Owners of freezer ships which caught Alaskan fish and took them to the state of Washington for canning claimed the tax was discriminatory. This Court rejected the claim of discrimination because local Alaskan canneries

paid a different tax of six percent on fish which they obtained for canning. The Court also said that, if there was any discrimination, it was in favor of the freezer ships because the tax on their fish was less than the tax on fish obtained by local canners.

Again, the same factors exist in the present case. For companies which manufacture in West Virginia pay a different tax than out-of-state manufacturers such as Armco, and the tax paid by the local producers is higher than that paid by the "foreign" producers.

CONCLUSION

For the foregoing reasons, the decision of the court below should be affirmed.

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No. 83-297

IN THE

SUPREME COURT

OF THE

UNITED STATES

OCTOBER TERM, 1983

ARMCO, INC.

Appellant,

v.

DAVID C. HARDESTY, JR.
STATE TAX COMMISSIONER OF WEST VIRGINIA,

Appellee.

ON APPEAL FROM THE SUPREME COURT OF APPEALS OF THE STATE OF WEST VIRGINIA

BRIEF OF THE STATE OF WASHINGTON AS AMICUS CURIAE IN SUPPORT OF APPELLEE

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QUESTIONS PRESENTED

1. Whether sufficient nexus exists with regard to the appellant's sales to West Virginia customers to allow West Virginia, consistent with Due Process Clause and Commerce Clause requirements, to impose its business and occupation privilege tax on appellant's in-State selling activities.

2. Whether the principles of the unitary business concept are appropriate in determining whether a corporation has entered a state in such a fashion that nexus with regard to any one of its activities may be determined based upon its overall in-state operations.

3. Whether the Commerce Clause prohibits a state from imposing a gross receipts tax on wholesale sales of property manufactured outside the state, where an exemption from the tax is provided with respect to the wholesale sales of property manufactured within the state, but a gross receipts tax on the manufacturing of those products subject to the exemption is imposed at a higher rate.

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No. 83-297

IN THE

SUPREME COURT

OF THE

UNITED STATES

OCTOBER TERM, 1983

ARMCO, INC.

Appellant,

v.

DAVID C. HARDESTY, JR.
STATE TAX COMMISSIONER OF WEST VIRGINIA,

Appellee.

ON APPEAL FROM THE SUPREME COURT OF APPEALS OF THE STATE OF WEST VIRGINIA

BRIEF OF THE STATE OF WASHINGTON AS AMICUS CURIAE IN SUPPORT OF APPELLEE

STATEMENT OF INTEREST OF AMICUS CURIAE

This appeal involves the constitutionality, under the Due Process Clause of the Fourteenth Amendment and under the Commerce Clause, of the West Virginia business and occupation tax as applied to sales by Armco to West Virginia customers during the years 1970 through 1975. The Washington business and occupation tax (chapter 82.04 Wash. Rev. Code) is a gross receipts tax very similar to the West Virginia tax. Accordingly, the Court's decision in this appeal as to the permissible scope of the West Vir-

ginia tax may affect the scope of the Washington tax as well.

In this brief, however, we directly address only two of the product lines involved; *i.e.*, sales made by Armco's Steel Group and Union Wire Rope Group. For these first two product lines present most clearly, in our view, the major constitutional issues which are our concern.

STATEMENT OF THE CASE

The nature of the West Virginia tax, the description of the product lines, the methods by which Armco reaches its West Virginia market for these product lines, and the nature of Armco's other West Virginia business operations, together with a summary of the proceedings below, are all set forth at pages 3-5 of Armco's brief and need not be repeated here.

We would, however, supplement Armco's discussion of the proceedings below by showing the various legal theories adopted at each stage of the proceedings below. For these three theories are, in large part, the subject of this brief, and they provide the three alternative grounds on which the major issue in this case can be resolved.

(1)

On the administrative level, the West Virginia Tax Commissioner included within the tax base the two product lines which are the subject of this brief for reasons which he stated as follows:

> "The second issue for determination is whether sales made by the taxpayer's Steel Group and Union Wire Rope Group to West Virginia customers are properly subject to the business and occupation tax.
>
> "It is determined that these sales are properly subject to the business and occupation tax, and are, therefore, properly included in the present assessment. The taxpayer was 'engaging or continuing within this State in the business of selling any tangible property * * * *' as required by West Virginia Code § 11-13-2c during the audit period by the activity of its non-

resident salesmen in West Virginia. The taxpayer, through the efforts of its salesmen in-state, systematically solicited orders for the wholesale purchase of its products by West Virginia customers. This activity satisfies the requirements of Code § 11-13-2c because without the work engaged in by the salesmen in West Virginia these sales would not have transpired.

"Sufficient nexus to allow taxation of these transactions can also be found from the activity of the taxpayer's salesmen in West Virginia. These salesmen solicited orders in-state. In addition, they engaged in follow up activity which included the taking of succeeding orders and follow up calls on customers to check on their satisfaction with the taxpayer's products. All of these activities were carried out in a systematic and repetitive manner within West Virginia, and they are crucial to the development and maintenance of a market for the taxpayer's products in this State." Appendix C, J.S. 47a, 48a.

(2)

In reviewing the Commissioner's decision— solely upon the administrative record, with no further evidentiary hearing—the West Virginia Circuit Court rejected this theory of the Tax Commissioner. It held that the in-state activities of non-resident personnel were insufficient to provide the constitutionally required nexus. For this holding the Circuit Court relied primarily upon *Norton Co. v. Department of Revenue*, 340 U.S. 534 (1951), stating that these in-state activities did not provide the "local grip on the seller" necessary to provide the required nexus, emphasizing the non-resident status of the sales personnel involved and distinguishing, on this basis, those cases in which resident personnel provided nexus through their in-state activities. Appendix B, J.S. 27a-29a.[1]

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[1]One of the cases so distinguished was *Standard Pressed Steel Co. v. Department of Revenue of Washington*, 419 U.S. 560 (1975) which, as the Circuit Court correctly noted, involved a resident employee of the taxpayer. Appendix C, J.S. 29a.

A potential source of factual confusion arising from the Circuit Court's opinion should also be noted. That Court stated that about 77

(3)

The West Virginia Supreme Court of Appeals took a quite different approach from both that of the Tax Commissioner and that of the Circuit Court. It focused upon the West Virginia activities of other divisions of Armco, *i.e.*, the Mining Division and the section of the Metals Products Division which handled everything in the latter division's product line except metal buildings. As for these two parts of its West Virginia operations, Armco does not dispute the applicability of the West Virginia tax, since the Mining Division operates four in-state coal mines and the Metal Products Division operates an in-state sales office which handles everything in its product line except metal buildings.

Finding that these two parts of Armco's West Virginia operations formed a unitary business with all of its other West Virginia operations, the Supreme Court of Appeals reversed the Circuit Court and held that this provided sufficient nexus for all the other West Virginia operations as well, including those of the Steel Group and Union Wire Group.

INTRODUCTION AND SUMMARY

This appeal presents two distinct issues. The first we shall term the nexus issue, and the second the discrimination issue. Armco asserts, under the nexus issue, that its West Virginia sales of product lines involving only nonresident sales personnel do not have sufficient nexus with West Virginia to permit inclusion in the West Virginia tax base.

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percent of the West Virginia sales of two product lines here under discussion, steel and wire rope, were solicited at customers' headquarters located outside West Virginia. Appendix C, J.S. 26a. As correctly pointed in Armco's brief, however, this statement apparently has reference to the factual situation in 1976, which is outside the 1970-75 audit period. See Armco Br., page 5, note 2 and J.A. 17. Thus, this statement does not appear to negate the findings made by the Commissioner in his administrative order, as quoted above.

Alternatively, under the discrimination issue, Armco asserts that even if there is sufficient nexus, sales of these product lines must nevertheless be excluded from the tax base, because these product lines are manufactured outside West Virginia. And by its terms the West Virginia business and occupation tax reaches only sales of products manufactured outside the state, but not products manufactured within the state, thus supposedly resulting in an unconstitutional discrimination.

While we believe that the West Virginia Supreme Court of Appeals reached the correct result on both of these issues, we have difficulty with the route by which that court reached its result on the nexus issue. Thus, we do not believe it necessary—in order to find the required nexus for the transactions in question, to rely upon the unitary business theory. *Cf., Exxon Corp. v. Wisconsin Department of Revenue*, 447 U.S. 207 (1980). Nor is it necessary to abandon the basic principle of *Norton Co. v. Department of Revenue*, 340 U.S. 534 (1951), *i.e.*, the requirement that there be a nexus between the specific transactions to be included in the tax base and substantial in-state activities of the taxpayer.[2] For the required nexus is here supplied by the in-state activities of Armco's sales personnel. The proper approach, in short, was that taken by the Tax Commissioner in his administrative order.

The approach of the Tax Commissioner, we recognize, is inconsistent with *McLeod v. Dilworth*, 322 U.S. 327 (1944), and invites the Court to plow new ground—though (we would add) much less new ground than that plowed by the Supreme Court of Appeals. But the *McLeod* case, together with *General Trading Co. v. State Tax Commission*, 322 U.S. 335 (1944) and *International Harvester Co. v. Dept. of Treasury*, 322 U.S. 340 (1944), forms an important trilogy of decisions, close examination of which shows the analytical weakness of the result in *McLeod* and the analytical strength of the Tax Commissioner's approach.

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[2]On the other hand, we also disagree with the Circuit Court's application of *Norton*.

The framework for that latter approach also stems directly from the analysis found in the separate opinions of Mr. Justice Rutledge in all three decisions (concurring in *International Harvester* and *General Trading*, but dissenting in *McLeod*).

Under what we thus believe to be the correct framework, only the market state, and not the state of origin, is allowed to include in its tax base the gross proceeds from interstate sales of tangible property. This type of *allocation* to the market state is to be used for both gross receipts taxes and sales taxes. And accordingly, for both types of taxes, *apportionment* of the tax base between the state of origin and the market state through the use of an apportionment formula is both inappropriate and unnecessary.[3] Further, the standards for determining when the market state has sufficient nexus with the sales to include them in its tax base through the allocation process are the same for both sales taxes and gross receipts taxes. And the reason for thus treating these two types of taxes similarly is that the line between them is conceptually thin and in fact often non-existent.

This approach, which has in effect been applied by this Court in all gross receipts tax cases in the intervening forty years, puts into proper perspective the real question arising under the nexus issue: Can the constitutionally-required nexus be provided by the in-state activities of a taxpayer's employees even though they are non-residents assigned to an out-of-state office?

Regarding the discrimination issue, we believe that the court below was correct in concluding that the exist-

[3]Conversely, formulary apportionment becomes appropriate and often necessary, of course, for net income taxes and for sales or gross receipts taxes imposed upon sales of interstate services, such as interstate transportation. *Cf., Complete Auto Transit, Inc. v. Brady*, 430 U.S. 274 (1977). Allocation of the sort used for sales of tangible property simply does not work in these other contexts. What we here term "allocation" is sometimes referred to as "apportionment." See, *e.g., Standard Pressed Steel v. Department of Revenue of Washington*, 419 U.S. 560, 564 (1975). Because, however, it is essentially different from formulary apportionment, we use the term "allocation" throughout this brief.

ence of the West Virginia tax on manufacturers, at a rate even higher than that on wholesalers, removes any support for the claim that the tax on Armco is discriminatory. The controlling decision on this issue is *Hinson v. Lott*, 75 U.S. 148 (1869).

Armco's claim of discrimination, however, has another facet—involving potential, rather than actual discrimination—which can be more accurately described and thought of as a claim of potential multiple taxation. That potential discrimination arises from the possibility that another state, in which Armco manufactures some of the product lines involved in this appeal, might have a tax system identical to that of West Virginia. If such were the case, the cumulative tax burden on Armco, resulting from the combined taxes of both states, would be greater than the single tax—on manufacturing only—which West Virginia would impose if that manufacturing took place in West Virginia.

This facet of the claim is not new to this Court. It is essentially the same as that presented and rejected in *General Motors v. Washington*, 377 U.S. 436 (1964) and *Standard Pressed Steel Co. v. Washington Department of Revenue of Washington*, 419 U.S. 560 (1975). It was rejected on the ground, fully applicable here, that the mere possibility of such a hypothetical cumulative burden does not invalidate the tax.

Further, after *Boston Stock Exchange v. State Tax Comm.*, 429 U.S. 318 (1977), it is doubtful that even such an actuality would constitute an unconstitutional discrimination. West Virginia's tax burden on Armco would *increase* if Armco were to move its manufacturing of the product lines in question into West Virginia. But *Boston Stock Exchange* shows that unconstitutional discrimination would exist if, and only if, such a move by Armco were to result in a *lower* West Virginia tax burden. And such, of course, is not the case at all under West Virginia's taxing system.

ARGUMENT

I. The Sales Taxed Herein Have the Required Nexus with West Virginia.

A. The Unitary Business Concept

The unitary business concept provides a method for solving a problem which is unique to the field of net income taxation, and involves the use of formulary apportionment. Simply put, the basic problem is that of determining which parts of a business are so closely related, interdependent, or integrated that they should all be considered as forming a single economic enterprise—to the total net income of which formulary apportionment should be applied. It thus involves the relationship between the in-state operations of a business and all out-of-state operations. It is based upon, and indeed implements, the same theory as that which justifies formulary apportionment in the first place; *i.e.*, the theory that separate accounting for each part of a single economic enterprise produces distorted results. See generally, Hellerstein and Hellerstein, *State and Local Taxation* (4th ed. 1978) 504-520.

The problem to which the unitary business concept is addressed, however, does not arise in the context of a gross receipts tax (such as the West Virginia business and occupation tax) or a sales tax, at least as applied to sales of tangible property. For formulary apportionment has never been required for such taxes. See, *e.g.*, *Norton Co. v. Dep't. of Revenue*, 340 U.S. 534 (1951), *General Motors v. Washington*, 377 U.S. 436 (1964), and *Standard Pressed Steel Co. v. Department of Revenue of Washington*, 419 U.S. 560 (1975).

As shown by *Norton* and *General Motors*, however, gross receipts taxes may involve a problem which has a surface similarity to that involved in the unitary business concept. In determining whether sufficient nexus exists for the imposition of such a tax on the privilege of engaging in certain activities measured by gross receipts derived from

specific types of transactions, the relationship between those transactions and all *in-state* activities of the taxpayer must be examined. The purpose of this examination is to determine which, if any, of those in-state activities have a role in establishing and maintaining the market which gave rise to these transactions.

General Motors provides an illustration of this point. Among its operations, the taxpayer had a separate parts division (which had a warehouse in Portland, Oregon) from which sales were made to Washington automobile dealers. Although the parts division did not have its own sales staff to call upon these dealers, the automobile divisions (such as Chevrolet, Oldsmobile, and Pontiac) did have sales staffs performing this function. The in-state activities of these sales staffs, though directly involving only sales of automobiles to the dealers, certainly were an important factor in establishing and maintaining the market for the parts division. For without the sales of new cars, sales of parts to these dealers would obviously diminish or even disappear. Conversely, the operation of another warehouse of the parts division, located in Washington, was taken into account in determining whether sufficient nexus existed to tax the sales by the automobile divisions. For the improved service available by reason of this in-state warehouse undoubtedly assisted the taxpayer in its sales of new automobiles.

The parts division and the automobile divisions undoubtedly formed a unitary business. But this fact did not eliminate the need for the further inquiry: How were the Washington activities of each division related to those of the others with respect to establishing and maintaining the Washington market for each division's products?

In short, a determination that the various parts of an enterprise constitute a unitary business does not by itself supply the constitutionally required nexus.

Just as *General Motors* did not find nexus on the basis of the unitary business concept, neither did it repudiate, in our view, the basic approach to nexus issues estab-

lished in *Norton*. Rather, it applied that approach to a factual setting which was more complex than that in *Norton*, and found, within that setting, sufficient nexus for each of the specific types of transactions in controversy.

It is for these reasons that we disagree with the rationale for the result reached by the West Virginia Supreme Court of Appeals on the nexus issue. We are not suggesting, however, that the result itself was wrong. Instead, firmer underpinnings are available, such as those upon which the Tax Commissioner formulated the same result at the administrative level, and to which we next turn.

B. The In-State Activities of Armco's Steel Group and Union Wire Group Provide the Required Nexus.

In concluding that sales by Armco's Steel Group and its Union Wire Rope Group were properly included in the tax based, the West Virginia Tax Commissioner found as follows:

> "Sufficient nexus to allow taxation of these transactions can also be found from the activity of the taxpayer's salesmen in West Virginia. These salesmen solicited orders in-state. In addition, they engaged in follow up activity which included the taking of succeeding orders and follow up calls on customers to check on their satisfaction with the taxpayer's products. All of these activities were carried out in a systematic and repetitive manner within West Virginia, and they are crucial to the development and maintenance of a market for the taxpayer's products in this State." Appendix C, J.R. 47a, 48a.

These salesmen, however, did not operate out of West Virginia offices, or reside in West Virginia. Should this make a constitutional difference even though, as found by the Tax Commissioner, the in-state activities of these salesmen were "crucial to the development and maintenance of a market for the taxpayer's products in this State"?

From a purely factual standpoint *General Motors, supra*, and *Standard Pressed Steel, supra*, together with *McLeod v. Dilworth Co.*, 322 U.S. 327 (1944) certainly do support the conclusion that it does make a difference. For *General Motors* and *Standard Pressed Steel*, resident personnel were involved, and their activities supplied, in whole or in part, the required nexus for the Washington business and occupation tax.[4] And in *McLeod*, on the other hand, the Court invalidated an Arkansas sales tax when only non-resident salesmen were involved.

This appeal, however, presents the opportunity to re-examine the questions of the constitutional necessity of using an in-state office or resident personnel. In turn, we submit, the argument for finding no such necessity is based upon practical realities. The fact that Armco's sales personnel come from across the border in order to do their work in West Virginia does not make that in-state work any less important and decisive in developing and maintaining the West Virginia market. And the Tax Commissioner, in effect, so found.

Mr. Justice Rutledge, in his dissent in *McLeod*, expressed a similar point:

> "* * * [F]or every relevant constitutional consideration affecting taxation of transactions, regular, continuous, persistent solicitation has the same economic, and should have the same legal, consequences as does maintaining an office for soliciting and even contracting purposes or maintaining a place of business, where the goods actually are shipped into the state from without for delivery to the particular buyer. * * *" 322 U.S. at 354.

The "relevant constitutional considerations" are discussed by Mr. Justice Rutledge in the remainder of his opinion, which was filed not only as a dissent in *McLeod*,

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[4] We say "in part" because in *General Motors*, the activities of non-resident personnel were also relied upon in finding the required nexus. See, 377 U.S. at 445-446. But the court was not there presented with the question of whether these activities, by themselves, would have been sufficient.

but as a concurrence in *General Trading Co. v. State Tax Comm'n.*, 322 U.S. 335 (1944) and *International Harvester Co. v. Dep't of Treasury*, 322 U.S. 340 (1944). Because of the analytical clarity of this opinion, and the light which it casts upon the relevant Due Process and Commerce Clause considerations and upon their relationship with each other, we reproduce the opinion from *McLeod* as an appendix to this brief. We here outline its major points.[5]

Under Mr. Justice Rutledge's analysis, the gross receipts tax involved in *International Harvester*, the sales tax involved in *McLeod*, and the vendor-collected use tax involved in *General Trading* should be considered as practical equivalents for constitutional purposes. 322 U.S. at 350, 362. Although the legal incidence of each tax was not the same—the legal incidence of a use tax being upon the buyer, that of a gross receipts tax being upon the seller, and that of a sales tax being upon either the buyer or seller—each tax had (and has) an equivalent practical effect of imposing a tax burden on sales transactions.[6]

When that sales transaction is an interstate sale, the constitutional problems which arise under both the Due Process Clause and the Commerce Clause are thus essentially the same for each type of tax.[7] The Due Process problem is to determine whether the taxing state has a sufficient connection with the transaction to justify imposition of the tax or collection obligation. But the answer to

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[5]Justice Rutledge's analysis is further developed in his concurring opinion in *Freeman v. Hewit*, 329 U.S. 249, at 259-283 (1946), upon which *Complete Auto Transit v. Brady*, 430 U.S. 274 (1977) places significant reliance in its important development of a modern, realistic framework for dealing with problems of state taxation of interstate business. See, 430 U.S. at 280, 288, n. 15.

[6]The practical divergence between the legal incidence of a tax and its economic burden has been considered by this Court in other contexts as well. *Cf., Washington v. United States*, ___ U.S. ___, 103 S.Ct. 1344 (1983).

[7]Mr. Justice Douglas, in his opinion for the majority in *International Harvester*, took this same approach in dealing with the nexus problems involved here. 322 U.S. at 345, 348, 349.

that problem may be that *both* the state of origin and the market state have a sufficient connection.

This, in turn, gives rise to the Commerce Clause problem. Should both states be allowed to tax? Or neither? Or only one? And if only one, which one? Or, as an alternative to all of these, should some sort of apportionment between the state of origin and the market state be required? See 322 U.S. at 357-360.

The proposed solution for this problem is to allocate the transaction solely to the market state. This not only avoids the possibility of two states each effectively imposing a tax on the same transaction, but also places "* * * the same tax load on both interstate and competing local business." 322 U.S. at 361.

Mr. Justice Rutledge's solution has been followed in subsequent decisions. Thus, the state of origin is completely precluded from imposing a gross receipts tax, a sales tax, or a use tax with respect to an interstate sale. See, *Evco v. Jones*, 409 U.S. 91 (1972).[8] Accordingly, no need exists for formulary apportionment between the state or origin and the market state; and such apportionment has not been required by this Court, as shown by *Norton*, *General Motors* and *Standard Pressed Steel*.

As also shown by these same cases, the question becomes whether the market state has sufficient nexus to include the interstate transaction within the tax base. If that state may not reach the transaction, no state may do so. Thus the nexus question is best thought of as a due process question, as Justice Rutledge thought of it, rather than as a commerce clause question. And what turns on that nexus question, as a practical matter, is whether *any* state may reach the interstate transaction.

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[8]One will not find in these subsequent decisions, such as *Evco*, an explicit statement that the state of origin is completely out of the running at the very start. But this has been, we believe, the practical effect of such decisions as understood by the various state tax administrators and state courts. See, *e.g.*, *Crown Zellerbach Corp. v. State of Washington*, 45 Wn.2d 749, at 755, 278 P.2d 305 (1954), so applying *Freeman v. Hewit*, 329 U.S. 249 (1946).

That is precisely what is involved in the nexus question presented here as well. If West Virginia may not reach, with a gross receipts tax, the sales transactions by the Steel Group and the Wire Rope Group, no state may do so.

In deciding whether West Virginia may do so, despite that lack of an office or any resident personnel, the determinative due process consideration should be, as suggested by Mr. Justice Rutledge, the nature and extent of Armco's in-state activities in soliciting and servicing its customers, and not where its personnel hang their hats. This was the controlling consideration in *General Trading*; but any differences between the vendor-collected use tax involved there and the gross receipts tax involved here are so slight, as a practical matter, that they should be insignificant for due process purposes.

Let us also make one final point regarding Mr. Justice Rutledge's analysis as applied to the question of the continuing vitality of *Norton*. The analysis assumes that, whatever the standards for finding adequate nexus might be, such nexus must be found for the specific transactions which the State is attempting to include in its tax base. We do not question the validity of that assumption, as applied to sales and gross receipts taxes—though the West Virginia Supreme Court of Appeals obviously did. As shown, however, by *National Geographic Society v. California Board of Equalization*, 430 U.S. 551 (1977), this type of transactional nexus is not required with respect to a vendor-collected use tax. And in that respect, this Court has moved well beyond *General Trading*. But we are not suggesting that this Court should make a similar move with respect to a gross receipts tax. Nor do we believe Mr. Justice Rutledge's analysis would support such a move, despite its discussion of the practical equivalency between a gross receipts tax, a sales tax, and a vendor-collected use tax.

This is, of course, another way of saying that the basic approach of *Norton* should be retained, and that Mr. Jus-

tice Rutledge's analysis does not suggest otherwise.[9] If, however, the sales transactions which were excluded from the tax base in *Norton* had in fact involved in-state activities of the taxpayer's sales or service personnel (though they were non-residents operating from an out-of-state office) even without any connection with the taxpayer's other in-state operations, those sales transactions should have been included in the tax base. Indeed, that is the essence of our whole argument here.

II. The West Virginia Tax Does Not Discriminate Against Interstate Commerce.

The potential scope of the discrimination issue here addressed is broader than the nexus issue. For it involves *all* of Armco's West Virginia sales of products manufactured outside the state, including those as to which Armco concedes the existence of nexus and accordingly is not contesting tax liability.[10] Under Armco's discrimination argument, even sales to West Virginia customers from a West Virginia store or warehouse would be excluded from the tax base if the seller had also manufactured those products outside the state.

For the argument is that the exemption of in-state manufacturers from the wholesaling tax for products man-

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[9] The precise issue in *Norton*, which involved the Illinois retailers occupation tax, is now really moot in Illinois. For that tax, which was considered a gross receipts tax originally, has now attained the status of a typical sales tax. This is because of an increase in the rate, and the addition of a compensating use tax. See *United States v. Dept. of Revenue of Illinois*, 371 U.S. 21, aff'g 202 F.Supp. 757 (N.D. Ill. 1962). With the addition of this use tax, *National Geographic* and *Nelson v. Sears Roebuck and Co.*, 312 U.S. 359 (1941) would apply to the transactions found non-taxable in *Norton*. This development of the Illinois retailers occupation tax illustrates also the near impossibility of distinguishing between what is normally thought of as a gross receipts tax and what is normally thought of as a sales tax and the wisdom of Mr. Justice Rutledge in treating them as practical equivalents.

[10] The sales as to which nexus is conceded are all sales by the Metal Products division, other than sales of metal buildings. For these sales admittedly involved the utilization of a West Virginia office. Armco Br. 5.

ufactured and sold by them within the state is discriminatory. The supposed discrimination is against all taxpayers, such as Armco, who manufacture outside the state but make wholesale sales within the state, and accordingly do not receive the benefit of this exemption. And this supposed discrimination exists even though the in-state manufacturers who do receive the benefit of this exemption must pay a tax on their manufacturing operations which is more than triple that paid on wholesaling.[11]

Armco's argument has two distinct prongs, which we examine in turn.

A. The Wholesaling Tax is not Discriminatory When Viewed in Isolation From Other Jurisdictions.

If West Virginia had provided the exemption for wholesalers which Armco here complains of, but had not taxed manufacturing at all, or had taxed it at a lesser rate than the tax on wholesaling, an unconstitutional discrimination would unquestionably exist. But the tax on manufacturing removes that discrimination, as the Supreme Court of Appeals concluded.

The correctness of this conclusion was established over one hundred years ago in *Hinson v. Lott*, 75 U.S. (8 Wall.) 148 (1869). *Hinson* involved a challenge to an Alabama statute imposing a tax of fifty cents per barrel on liquor introduced into Alabama for sale there. The challenge was brought by a dealer who had purchased his liquor from outside Alabama for sale within it. The Court stated that, standing alone, the tax would necessarily fall as discriminatory against interstate commerce. 75 U.S. at 150. But finding that a tax was also imposed upon all Alabama distillers of liquor, at the same rate of fifty cents per

[11] For both manufacturers and wholesalers, the tax base is the same, *i.e.*, gross proceeds from the sale of the goods. But the rate on manufacturing during the relevant period was 0.80 percent and later 0.88 percent, while the rate on wholesaling was 0.25 percent and later 0.27 percent (Armco Br. 3).

gallon, the court held that the tax on dealers of imported liquor did not violate the Commerce Clause, stating:

> "As the effect of the act is such as we have described, and it institutes no legislation which discriminates against the products of sister States, but merely subjects them to the same rate of taxation which similar articles pay that are manufactured within the State, we do not see in it an attempt to regulate commerce, but an appropriate and legitimate exercise of the taxing power of the States." 75 U.S. at 153.

So too here.[12]

Armco argues, however, that the West Virginia tax on manufacturers does not remove the discrimination. The argument, quite interestingly, is that the tax, rather than being too narrow, is instead too broad. For it applies, with no reduction in rate, even if the products manufactured are not subject to the wholesaling tax, and even if the products are sold by the manufacturer at the retail level in West Virginia, and are thus subject to the retailing tax. (Armco Br. 23, 24). Accordingly, it is argued, the tax on manufacturers should not be viewed as a substitute for the tax on wholesalers.

The argument is specious. Surely West Virginia's decision to tax its manufacturers to such a broad extent does not produce any sort of discrimination against Armco. For the fact remains that the wholesaling exemption of which Armco complains applies only to sales of products which

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[12] While the Court's subsequent opinion in *Walling v. Michigan*, 116 U.S. 446 (1886) cannot be fully reconciled with its decision in *Hinson*, the Court has continued to apply the holding of *Hinson* and its principle that the structure of the state's entire tax may be analyzed to determine the existence of discrimination. Thus, the Court has upheld compensating use taxes against a Commerce Clause challenge, characterizing its finding of equivalence in the tax burden wrought by the sales and use taxes as a "common sense conclusion." *Henneford v. Silas Mason Co.*, 300 U.S. 577, 584 (1937). There the Court relied on both its decision in *Hinson* and its later holding, applying the *Hinson* principle, in *General American Tank Car Corp. v. Day*, 270 U.S. 369 (1926).

The decision in *Columbia Steel Co. v. State of Washington*, 30 Wn.2d 658, 192 P.2d 976 (1948) is contrary to *Hinson* and for that reason simply wrong.

have been subject to the higher manufacturing tax. That fact provides any necessary substitution. That the manufacturing tax applies to other products as well, to the detriment of the West Virginia manufacturers, is completely beside the point.

B. The Wholesaling Tax is not Discriminatory When Viewed in Conjunction With Other Jurisdictions.

The argument which we have just considered involves a claim of actual discrimination, arising solely from the effects of West Virginia's tax system alone. The discrimination argument we consider here, in contrast, involves a claim of potential discrimination, which would arise from the combined effects of two tax systems: that of West Virginia and that of another state should it also choose to adopt the same system as West Virginia. If Armco were subject to both states' systems, because it manufactured in one state and sold the products so manufactured in the other, the combined taxes would be greater than the tax imposed on Armco by West Virginia alone.

The possibility which Armco here envisions is merely that, and not an actuality. That same possibility exists under Washington's business and occupation tax, and was twice urged upon this Court as a ground for invalidating Washington's tax as applied to sales of products manufactured by the taxpayer outside Washington. The argument was rejected each time, on the rationale that the mere possibility will not suffice. See *General Motors*, 377 U.S. at 448, 449. See also *Standard Pressed Steel*, in which the Court relied upon *General Motors* in rejecting this same claim:

> " 'We noted in General Motors that a vice in a tax on gross receipts of a corporation doing an interstate business is the risk of multiple taxation; but that the burden is on the taxpayer to demonstrate it. Id., at 449. The corporation made no such showing there.

Nor is any effect made to establish it here.' 419 U.S. at 593."[13]

Armco is here in the same position as the taxpayers in *General Motors* and *Standard Pressed Steel*. It can rely only on hypotheticals, and cannot show that in fact it suffers from the situation it envisions.

One further comment regarding that situation, however, may be useful. If the State in which Armco does its manufacturing imposed only a tax upon manufacturing, and not upon wholesaling at all—while the State in which Armco did its wholesaling imposed only a tax upon wholesaling, and not upon manufacturing at all—Armco would be faced, for all practical purposes, with the same situation as the one it complains of here. For the cumulative burden upon Armco would be greater than that upon an integrated manufacturer-wholesaler operating in one of those States alone.

In such a hypothetical situation, must one State give way to the other? And if so, which State should it be? The State of manufacture? Or the State of sale? Or should formulary apportionment between the two be required? These are more difficult questions than those arising when only sales activities, and not manufacturing activities, are involved. They should be resolved only when they are presented in an actual situation.[14] No such actual situation

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[13] In both *General Motors* and *Standard Pressed Steel*, the Court phrased the question in terms of possible multiple taxation, rather than possible discrimination. But the question is the same, whichever way it is phrased. It should also be noted that three justices dissented from this portion of the *General Motors* holding (377 U.S. at 460) but none from the *Standard Pressed Steel* holding.

[14] The same basic questions can arise in other contexts. For example, the production of coal might be taxed by a severance tax, as in *Commonwealth Edison v. Montana Co.*, 453 U.S. 609 (1981) and the consumption of that same coal in another State might be subject to a use tax. Similar questions can also arise in the context of a net income tax, as in *Mobil Oil Corp. v. Commissioner*, 445 U.S. 425, 444. The taxpayer there argued that Vermont should not be allowed to include dividend income in the tax base to be apportioned by Vermont under formulary apportionment because of the State of the taxpayer's corporate domicile, New York, might decide to allocate to itself all of the

existed in *General Motors* and *Standard Pressed Steel* and accordingly the Court did not address these questions. For the same reason, they need not be addressed here.

Lastly, even the hypothetical situation envisioned by Armco is completely different from those situations involved in this Court's recent decisions in which it has found state tax systems to be discriminatory.

> "* * * We are not, therefore, confronted here with the type of differential tax treatment of interstate and intrastate commerce that the Court has found in other 'discrimination' cases. See, e.g., Maryland v Louisiana, 451 US 725, (1981); Boston Stock Exchange v State Tax Comm'n, 429 US 318 (1977); * * * " *Commonwealth Edison Co. v. Montana*, 453 U.S. 609, 618 (1981).

If West Virginia had imposed upon an integrated manufacturer-wholesaler operating solely in West Virginia a *lesser* tax burden than that imposed upon an integrated manufacturer seller, such as Armco, which sells in West Virginia but manufactures outside the State, the constitutional vice found in *Boston Stock Exchange* and *Maryland v. Louisiana* would be present here as well. But in fact West Virginia does the exact opposite.

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taxpayer's dividend income. And this, of course, would produce a type of multiple taxation of the same dividends. The Court rejected the argument, stating:

> "* * * We agree with Mobil that the constitutionality of a Vermont tax should not depend on the vagaries of New York tax policy. But the absence of any existing duplicative tax does alter the nature of appellant's claim. Instead of seeking relief from a present tax burden, appellant seeks to establish a theoretical constitutional preference for one method of taxation over another. * * *" 453 U.S. at 444.

The Court thus disposed of the taxpayer's argument in essentially the same way that it disposed of the potential multiple taxation arguments in *General Motors* and *Standard Pressed Steel*.

CONCLUSION

For the reasons given above, the decision of the West Virginia Court of Appeals with respect to the application of the West Virginia Tax to Armco's Steel Group and Union Wire Group should be affirmed.

Respectfully submitted,

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APPENDIX

Opinion of Mr. Justice Rutledge [concurring in *General Trading Co. v. State Tax Commission*, 322 U.S. 335 (1944) and *International H. Co. v. Dept. of Treasury*, 322 U.S. 340 (1944); and dissenting in *McLeod v. Dilworth Co.*, 322 U.S. 327 (1944)] 322 U.S. at 349.

These three cases present in various applications the question of the power of a state to tax transactions having a close connection with interstate commerce.

In No. 311, *McLeod* v. *J. E. Dilworth Co.*, *ante*, p. 327, Arkansas has construed its tax to be a sales tax, but has held this cannot be applied where a Tennessee corporation, having its home office and place of business in Memphis, solicits orders in Arkansas, by mail, telephone or sending solicitors regularly from Tennessee, accepts the orders in Memphis, and delivers the goods there to the carrier for shipment to the purchaser in Arkansas. This Court holds the tax invalid, because "the sale—the transfer of ownership—was made in Tennessee. For Arkansas to impose a tax on such transaction would be to project its powers beyond its boundaries and to tax an interstate transaction." Though an Arkansas "use tax" might be sustained in the same situation, "we are not dealing with matters of nomenclature even though they be matters of nicety." And the case is thought to be different from the

Berwind-White case, 309 U. S. 33, where New York City levied the tax, because, in the Arkansas court's language, "the corporation maintained its sales office in New York City, took its contracts in New York City and made actual delivery in New York City. . . ."

On the other hand, in No. 441, *General Trading Co.* v. *State Tax Commission, ante*, p. 335, Iowa applies its "use tax" to a transaction in which a Minnesota corporation ships goods from Minnesota, its only place of business, to Iowa purchasers on orders solicited in Iowa by salesmen sent there regularly from Minnesota for that purpose, the orders being accepted in Minnesota. This tax the Court sustains. While "no State can tax the privilege of doing interstate business, . . . the mere fact that property is used for interstate commerce or has come into an owner's possession as a result of interstate commerce does not diminish the protection which it may draw from a State to the upkeep of which it may be asked to bear its fair share. But a fair share precludes legislation obviously hostile or practically discriminatory toward interstate commerce. . . . None of these infirmities affects the tax in this case. . . ." And the foreign or nonresident seller who does no more than solicit orders in Iowa, as the Tennessee seller does in Arkansas, may be made the state's tax collector.

In No. 355, *International Harvester Co.* v. *Dept. of Treasury, ante*, p. 340, the state applies its gross income tax, among other situations, to one (Class D) where a foreign corporation authorized to do and doing business in Indiana sells and delivers its product in Indiana to out-of-state customers who come into the state for the transaction. The Court sustains the tax as applied.

I.

For constitutional purposes, I see no difference but one of words and possibly one of the scope of coverage between the Arkansas tax in No. 311 and the Iowa tax in No. 441.

This is true whether the issue is one of due process or one of undue burden on interstate commerce. Each tax is imposed by the consuming state. On the records here, each has a due process connection with the transaction in that fact and in the regular, continuous solicitation there. Neither lays a greater burden on the interstate business involved than it does on wholly intrastate business of the same sort. Neither segregates the interstate transaction for separate or special treatment. In each instance therefore interstate and intrastate business reach these markets on identical terms, so far as the effects of the state taxes are concerned.

And in my opinion they do so under identical material circumstances. In both cases the sellers are "nonresidents" of the taxing state, foreign corporations. Neither seller maintains an office or a place of business there. Each has these facilities solely in the state of origin. In both cases the orders are taken by solicitors sent regularly to the taxing state for that purpose. In both the orders are accepted at the home office in the state of origin. And in both the goods are shipped by delivery to the carrier or the post in the state of origin for carriage across the state line and delivery by it to the purchaser in his taxing state.

In the face of such identities in connections and effects, it is hard to see how one tax can be upheld and the other voided. Surely the state's power to tax is not to turn on the technical legal effect, relevant for other purposes but not for this, that "title passes" on delivery to the carrier in Memphis and may or may not so pass, so far as the record shows, when the Minnesota shipment is made to Iowa. In the absence of other and more substantial difference, that irrelevant technical consideration should not control. However it may be determined for locating the incidence of loss in transit or other questions arising among buyer, seller and carrier, for purposes of taxation that

factor alone is a will-o'-the-wisp, insufficient to crux a due process connection from selling to consuming state and incapable of increasing or reducing any burden the tax may place upon the interstate transaction.

The only other difference is in the terms used by Iowa and Arkansas, respectively, to describe their taxes. For reasons of her own Arkansas describes her tax as a "sales tax." Iowa calls hers a "use tax." This court now is committed to the validity of "use" taxes: *Henneford* v. *Silas Mason Co.*, 300 U. S. 577; *Felt & Tarrant Manufacturing Co.* v. *Gallagher*, 306 U. S. 62; *Nelson* v. *Sears, Roebuck & Co.*, 312 U. S. 359; *Nelson* v. *Montgomery Ward & Co.*, 312 U. S. 373. Similarly, "sales taxes" on "interstate sales" have been sustained. In *McGoldrick* v. *Berwind-White Coal Mining Co.*, 309 U. S. 33, such a tax applied by the state of the market was upheld. Compare *Banker Brothers Co.* v. *Pennsylvania*, 222 U. S. 210; *Wiloil Corp.* v. *Pennsylvania*, 294 U. S. 169. Other things being the same, constitutionality should not turn on whether one name or the other is applied by the state. *Wisconsin* v. *J. C. Penney Co.*, 311 U. S. 435. The difference may be important for the scope of the statute's application, that is, whether it is intended to apply to some transactions but not to others that are within reach of the state's taxing power. It hardly can determine whether the power exists.

II.

The Court's different treatment of the two taxes does not result from any substantial difference in the facts under which they are levied or the effects they may have on interstate trade. It arises rather from applying different constitutional provisions to the substantially identical taxes, in the one case to invalidate that of Arkansas, in the other to sustain that of Iowa. Due process destroys the former. Absence of undue burden upon interstate commerce sustains the latter.

It would seem obvious that neither tax of its own force can impose a greater burden upon the interstate transaction to which it applies than it places upon the wholly local trade of the same character with which that transaction competes. By paying the Arkansas tax the Tennessee seller will pay no more than an Arkansas seller of the same goods to the same Arkansas buyer; and the latter will pay no more to the Tennessee seller than to an Arkansas vendor, on account of the tax, in absorbing its burden. The same thing is true of the Iowa tax in its incidence upon the sale by the Minnesota vendor. The cases are not different in the burden the two taxes place upon the interstate transactions. Nor in my opinion are they different in the existence of due process to sustain the taxes.

"Due process" and "commerce clause" conceptions are not always sharply separable in dealing with these problems. Cf. *e. g., Western Union Telegraph Co.* v. *Kansas*, 216 U. S. 1. To some extent they overlap. If there is a want of due process to sustain the tax, by that fact alone any burden the tax imposes on the commerce among the states becomes "undue." But, though overlapping, the two conceptions are not identical. There may be more than sufficient factual connections, with economic and legal effects, between the transaction and the taxing state to sustain the tax as against due process objections. Yet it may fall because of its burdening effect upon the commerce. And, although the two notions cannot always be separated, clarity of consideration and of decision would be promoted if the two issues are approached, where they are presented, at least tentatively as if they were separate and distinct, not intermingled ones.

Thus, in the case from Arkansas no more than in that from Iowa should there be difficulty in finding due process connections with the taxing state sufficient to sustain the tax. As in the Iowa case, the goods are sold and shipped to Arkansas buyers. Arkansas is the consuming state,

the market these goods seek and find. They find it by virtue of a continuous course of solicitation there by the Tennessee seller. The old notion that "mere solicitation" is not "doing business" when it is regular, continuous and persistent is fast losing its force. In the *General Trading* case it loses force altogether, for the Iowa statute defines this process in terms as "a retailer maintaining a place of business in this state."[1] The Iowa Supreme Court sustains the definition and this Court gives effect to its decision in upholding the tax. Fiction the definition may be; but it is fiction with substance because, for every relevant constitutional consideration affecting taxation of transactions, regular, continuous, persistent solicitation has the same economic, and should have the same legal, consequences as does maintaining an office for soliciting and even contracting purposes or maintaining a place of business, where the goods actually are shipped into the state from without for delivery to the particular buyer. There is no difference between the Iowa and the Arkansas situations in this respect. Both involve continuous, regular, and not intermittent or casual courses of solicitation. Both involve the shipment of goods from without to a buyer within the state. Both involve taxation by the state of the market. And if these substantial connections are sufficient to underpin the tax with due process in the one case, they are also in the other.

That is true, if labels are not to control, unless something which happens or may happen outside the taxing state operates in the one case to defeat the jurisdiction, but does not defeat it in the other.

As I read the Court's opinion, though it does not explicitly so state, the Arkansas tax falls because Tennessee could tax the transaction and, as between the two states, has exclusive power to do so. This is because "the sale—the transfer of ownership—was made in Tennessee."

[1] Cf. *Frese* v. *Louisville Cement Co.*, 134 F. 2d 511 (App. D. C.).

Arkansas' relation to the transaction is constitutionally different from that of New York in the *Berwind-White* case, though both are the state of the market, because the Berwind-White Company "maintained its sales office in New York City, took its contracts in New York City and made actual delivery in New York City." This "constituted a sale in New York and accordingly we sustained a retail sales tax by New York." So here the company's "offices are maintained in Tennessee, the sale is made in Tennessee, and the delivery is consummated either in Tennessee or in interstate commerce. . . ." The inevitable conclusion, it seems to me, is that the Court is deciding not only that Arkansas cannot tax the transaction, but that Tennessee can tax it and is the only state which can do so. To put the matter shortly, Arkansas cannot levy the tax because Tennessee can levy it. Hence "for Arkansas to impose a tax on such transaction would be to project its powers beyond its boundaries and to tax an interstate transaction."

This statement of the matter appears to be a composite of due process and commerce clause ideas. If so, it is hard to see why the same considerations do not nullify Iowa's power to levy her tax in the identical circumstances and vest exclusive jurisdiction in Minnesota to tax these transactions. For in the Iowa case the selling corporation maintains its office and place of business in Minnesota, accepts the orders there, and the delivery, which is to carrier or post, is consummated, so far as the record shows, exactly in the manner it is made in the Tennessee-Arkansas transaction. If these facts nullify Arkansas' power to tax the transaction by vesting exclusive jurisdiction in Tennessee, it would seem *a fortiori* they would nullify Iowa's power and give Minnesota exclusive jurisdiction to tax the transactions there involved. Unless the sheer difference in the terms "sale" and "use," and whatever difference these might make as a matter of legislative selec-

tion of the transactions which are to bear the tax, are to control upon the existence of the power to tax, the result should be the same in both cases.

Merely as a matter of due process, it is hard to see why any of the four states cannot tax the transactions these cases involve. Each has substantial relations and connections with the transaction, the state of market not less in either case than the state of origin. It "sounds better" for the state of origin to call its tax a "sales tax" and the state of market to name its tax a "use tax." But in the *Berwind-White* case the latter's "sales tax" was sustained, where it is true more of the incidents of sale conjoined with the location of the place of market than do in either No. 311 or No. 441. If this is the distinguishing factor, as it might be for selecting one of the two connected jurisdictions for exclusive taxing power, it is not one which applies to either of these transactions. The identity is not between the *Dilworth* case and *Berwind-White*. It is rather between *Dilworth* and *General Trading*, with *Berwind-White* differing from both. And, so far as due process alone is concerned, it should make no difference whether the tax in the one case is laid by Arkansas or Tennessee and in the other by Iowa or Minnesota. Each state has a sufficiently substantial and close connection with the transaction, whether by virtue of tax benefits conferred in general police protection and otherwise or on account of ideas of territorial sovereignty concerning occurrence of "taxable incidents" within its borders, to furnish the due process foundation necessary to sustain the exercise of its taxing power. Whether it exerts this by selecting for "impingement" of the tax some feature or incident of the transaction which it denominates "sale" or "use" is both illusory and unimportant in any bearing upon its constitutional authority as a matter of due process. If this has any substantive effect, it is merely one of legislative intent in selecting the transactions to bear the tax and thus

fixing the scope of its coverage, not one of constitutional power. "Use" may cover more transactions with which a state has due process connections than "sale." But whenever sale occurs and is taxed the tax bears equally, in final incidence of burden, upon the use which follows immediately upon it.

The great difficulty in allocating taxing power as a matter of due process between the state of origin and the state of market arises from the fact that each state, considered without reference to the other, always has a sufficiently substantial relation in fact and in tax benefit conferred to the interstate transaction to sustain an exertion of its taxing power, a fact not always recognized. And from this failure, as well as from the terms in which statutes not directed specifically to reaching these transactions are cast, comes the search for some "taxable incident taking place within the state's boundaries" as a hook for hanging constitutionality under due process ideas. "Taxable incident" there must be. But to take what is in essence and totality an interstate transaction between a state of origin and one of market and hang the taxing power of either state upon some segmented incident of the whole and declare that this does or does not "tax an interstate transaction" is to do two things. It is first to ignore that any tax hung on such an incident is levied on an interstate transaction. For the part cannot be separated from the whole. It is also to ignore the fact that each state, whether of origin or of market, has by that one fact alone a relation to the whole transaction so substantial as to nullify any due process prohibition. Whether the tax is levied on the "sale" or on the "use," by the one state or by the other, it is in fact and effect a tax levied on an interstate transaction. Nothing in due process requirements prohibits either state to levy either sort of tax on such transactions. That Tennessee therefore may tax this transaction by a sales tax does not, in any proper conception of due process, deprive Arkansas of the same power.

III.

When, however, the issue is turned from due process to the prohibitive effect of the commerce clause, more substantial considerations arise from the fact that both the state of origin and that of market exert or may exert their taxing powers upon the interstate transaction. The long history of this problem boils down in general statement to the formula that the states, by virtue of the force of the commerce clause, may not unduly burden interstate commerce. This resolves itself into various corollary formulations. One is that a state may not single out interstate commerce for special tax burden. *McGoldrick* v. *Berwind-White Coal Mining Co.*, 309 U. S. 33, 55–56. Nor may it discriminate against interstate commerce and in favor of its local trade. *Welton* v. *Missouri*, 91 U. S. at 275; *Guy* v. *Baltimore*, 100 U. S. 434; *Voight* v. *Wright*, 141 U. S. 62. Again, the state may not impose cumulative burdens upon interstate trade or commerce. *Gwin, White & Prince* v. *Henneford*, 305 U. S. 434; *Adams Mfg. Co.* v. *Storen*, 304 U. S. 307. Thus, the state may not impose certain taxes on interstate commerce, its incidents or instrumentalities, which are no more in amount or burden than it places on its local business, not because this of itself is discriminatory, cumulative or special or would violate due process, but because other states also may have the right constitutionally, apart from the commerce clause, to tax the same thing and either the actuality or the risk of their doing so makes the total burden cumulative, discriminatory or special.[2]

In these interstate transactions cases involving taxation by the state of origin or that of market, the trouble arises, under the commerce clause, not from any danger that either tax taken alone, whether characterized as "sales" or

[2] Cf. the opinion of the Chief Justice in *Northwest Airlines* v. *Minnesota*, *ante*, p. 308.

"use" tax, will put interstate trade at a disadvantage which will burden unduly its competition with the local trade. So long as only one tax is applied and at the same rate as to wholly local transactions, no unduly discriminatory clog actually attaches to the interstate transaction of business.

The real danger arises most obviously when both states levy the tax. Thus, if in the instant cases it were shown that, on the one hand, Arkansas and Iowa actually were applying a "use" tax and Tennessee and Minnesota a "sales" tax, so that in each case the interstate transaction were taxed at both ends, the heavier cumulative burden thus borne by the interstate business in comparison with the local trade in either state would be obvious. If in each case the state of origin were shown to impose a sales tax of three per cent and the state of market a use tax of the same amount, interstate transactions between the two obviously would bear double the local tax burden borne by local trade in each state. This is a difference of substance, not merely one of names, relevant to the problem created by the commerce clause, though not to that of "jurisdiction" under due process conceptions. And the difference would be no less substantial if the taxes levied by both the state of origin and that of market were called "sales" taxes or if, indeed, both were called "use" taxes.

The Iowa tax in No. 441 avoids this problem by allowing credit for any sales tax shown to be levied upon the transaction whether in Iowa or elsewhere. Clearly therefore that tax cannot in fact put the interstate transaction at a tax disadvantage with local trade done in Iowa or elsewhere.[3]

However, the Arkansas tax in No. 311 provides for no such credit. But in that case there is no showing that Tennessee actually imposes any tax upon the transaction.

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[3] Cf. text *infra* at note 4 *et seq.*

If there is a burden or clog on commerce, therefore, it arises from the fact that Tennessee has power constitutionally to impose a tax, may exercise it, and when this occurs the cumulative effect of both taxes will be discriminatorily burdensome, though neither tax singles out the transaction or bears upon it more heavily than upon the local trade to which it applies. In short, the risk of multiple taxation creates the unconstitutional burden which actual taxation by both states would impose in fact.

In my opinion this is the real question and the only one presented in No. 311. And in my judgment it is determined the wrong way, not on commerce clause grounds but upon an unsustainable application of the due process prohibition.

Where the cumulative effect of two taxes, by whatever name called, one imposed by the state of origin, the other by the state of market, actually bears in practical effect upon such an interstate transaction, there is no escape under the doctrine of undue burden from one of two possible alternatives. Either one tax must fall or, what is the same thing, be required to give way to the other by allowing credit as the Iowa tax does, or there must be apportionment. Either solution presents an awkward alternative. But one or the other must be accepted unless that doctrine is to be discarded and one of two extreme positions taken, namely, that neither state can tax the interstate transaction or that both may do so until Congress intervenes to give its solution for the problem. It is too late to accept the former extreme, too early even if it were clearly desirable or permissible to follow the latter.

As between apportionment and requiring one tax to fall or allow credit, the latter perhaps would be the preferable solution. And in my opinion it is the one which the Court in effect, though not in specific statement, adopts.

That the decision is cast more largely in terms of due process than in those of the commerce clause does not nullify that effect.

If in this case it were necessary to choose between the state of origin and that of market for the exercise of exclusive power to tax, or for requiring allowance of credit in order to avoid the cumulative burden, in my opinion the choice should lie in favor of the state of market rather than the state of origin.[4] The former is the state where the goods must come in competition with those sold locally. It is the one where the burden of the tax necessarily will fall equally on both classes of trade. To choose the tax of the state of origin presents at least some possibilities that the burden it imposes on its local trade, with which the interstate traffic does not compete, at any rate directly, will be heavier than that placed by the consuming state on its local business of the same character. If therefore choice has to be made, whether as a matter of exclusive power to tax or as one of allowing credit, it should be in favor of the state of market or consumption as the one most certain to place the same tax load on both the interstate and competing local business. Hence, if the risk of taxation by both states may be said to have the same constitutional consequences, under the commerce clause, as taxation in actuality by both, the Arkansas tax, rather than the power of Tennessee to tax, should stand.

It may be that the mere risk of double taxation would not have the same consequences, given always of course a sufficient due process connection with the taxing states, that actual double taxation has, or may have, for applica-

[4] Cf. Powell, New Light on Gross Receipts Taxes (1940) 53 Harv. L. Rev. 909; Lockhart, The Sales Tax in Interstate Commerce (1939) 52 Harv. L. Rev. 617; compare *Gwin, White & Prince* v. *Henneford*, 305 U. S. 434; *Adams Mfg. Co.* v. *Storen*, 304 U. S. 307.

tion of the commerce clause prohibition. Risk of course is not irrelevant to burden or to the clogging effect the rule against undue burden is intended to prevent. But in these situations it may be doubted, on entirely practical grounds, that the mere risk Tennessee may apply its taxing power to these transactions will have any substantial effect in restraining the commerce such as the actual application of that power would have. In any event, whether or not the choice must be made now or, as I think, has been made, it should go in favor of Arkansas, not Tennessee.

For all practical purposes Indiana's gross income tax in No. 355 may be regarded as either a sales tax or a use tax laid in the state of market, comparable in all respects (except in words) to the Arkansas tax laid in No. 311 and to the Iowa tax imposed in No. 441, except that here the seller as well as the buyer does business and concludes the transaction in Indiana, the state of the market. This is clearly true of Classes C and E. It is true also of Class D, in my opinion, although the buyer there resided in Illinois but went to Indiana to enter into the transaction and take delivery of the goods. That he at once removed them, on completion of the transaction there, to Illinois, intended to do this from the beginning and this fact may have been known to the seller, does not take from the transaction its character as one entered into and completed in Indiana. Whether or not Illinois, in these circumstances, could impose a use tax or some other as a property tax is not presented and need not be determined. If the Arkansas and Iowa taxes stand, or either does, *a fortiori* the Indiana tax stands in these applications.

Accordingly, I concur in the decisions in Nos. 441 and 355, but dissent from the decision in No. 311.

No. 83-297-ASX
Status: GRANTED

Title: Armco Inc., Appellant
v.
David C. Hardesty, Jr., State Tax Commissioner of West Virginia

Docketed:
August 23, 1983

Court: Supreme Court of Appeals of West Virginia

Counsel for appellant: Dailey, Richard R.

Counsel for appellee: Digges Jr., Robert

Entry	Date	Note	Proceedings and Orders
1	Aug 23 1983	G	Statement as to jurisdiction filed.
2	Sep 13 1983	N	Motion of appellant to consider this case in tandem with No. 82-1848, Chicago Bridge & Iron v. Washington Department of Revenue filed.
3	Sep 28 1983		DISTRIBUTED. October 14, 1983
4	Oct 7 1983		Opposition of appellees to motion of appellant to consider this case in tandem with No. 82-1848, filed.
5	Oct 13 1983	P	Response requested. (Due November 12, 1983 - NONE RECEIVED)
7	Nov 7 1983		Order extending time to file response to jurisdictional statement until November 23, 1983.
8	Nov 21 1983		Motion of appellee Hardesty, Tax Commr. of WV to dismiss or affirm filed.
9	Nov 22 1983		REDISTRIBUTED. December 9, 1983
10	Nov 23 1983	X	Reply brief of appellant Armco, Inc. filed.
11	Dec 12 1983		PROBABLE JURISDICTION NOTED.
			**********
12	Jan 26 1984		Brief of appellant Armco, Inc. filed.
13	Jan 26 1984		Joint appendix filed.
14	Feb 2 1984		Record filed.
15	Feb 29 1984		Brief of appellee Hardesty, Tax Commr. of WV filed.
16	Feb 29 1984		Brief amicus curiae of Natl. Conf. of State Legislatures, etc., et al. filed.
17	Feb 29 1984		Brief amicus curiae of State of Washington filed.
18	Mar 20 1984		SET FOR ARGUMENT. Tuesday, April 17, 1984. (3rd case)
19	Mar 23 1984	X	Reply brief of appellant Armco, Inc. filed.
20	Mar 27 1984		CIRCULATED.
21	Apr 17 1984		ARGUED.